SUPREME COURT OF THE UNITED STATES.

No. 199.

LESSEE OF GEORGE POMEROY, LEWIS WILSON, ELIAS BUTLER, AND WILLIAM BALDWIN, PLAINTIFF IN ERROR,

VS.

THE STATE BANK OF INDIANA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

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Pleas of the circuit court of the United States for the seventh judicial circuit and district of Indiana, begun, continued, and holden at Indianapolis, in said district, on the (15th) fifteenth day of November, in the year of our Lord eighteen hundred and fifty-eight, that being the first (1st) judicial day of the November term of the said court for the said year.

Present: The honorable Elisha W. Huntington, district judge of the United States for the district of Indiana.

JOHN DOE, ex-dem., GEORGE POMEROY, LEWIS C. WILSON, ELIAS BUTLER, WILLIAM BALDWIN, *vs.* RICHARD ROE.	Ejectment.

Be it remembered that heretofore, to wit, on the twenty-eighth (28th) day of April, in the year eighteen hundred and forty-nine, the plaintiffs filed in the office of the clerk of the said court their certain declaration, in these words and figures following, to wit:

In the circuit court of the United States.

UNITED STATES OF AMERICA,
District of Indiana, ss:

John Doe, plaintiff, complains of Richard Roe, defendant, of a plea of trespass and ejectment, for that George Pomeroy, Lewis C. Wilson, and Elias Butler, resident citizens of the State of New York, and William Baldwin, a resident citizen of the State of Ohio, on the first day of March, in the year of our Lord eighteen hundred and forty-eight, at the district aforesaid, had demised to the said John
2 Doe certain tenements and messages lying and being in the town of Laffayette and county of Tippecanoe, in the State of Indiana, to wit: Lots numbered ninety, (90,) ninety-four, (94,) ninety-five, (95,) and eighty-nine, (89,) as designated on the original plat of said town, with the appurtenances, of the value of two thousand dollars. To have and to hold the same to the said John Doe, from said first day of March, A. D. 1848, for the term of twenty years thence next ensuing.

And also, for that George Pomeroy, a resident citizen of the State of New York, on the first day of March, A. D. 1848, at the district aforesaid, had demised to said John Doe other lands and tenements lying and being in the town of Lafayette and county of Tippecanoe and State of Indiana, to wit: Lots numbered ninety, (90,) ninety-four, (94,) ninety-five, (95,) and eighty-nine, (89,) as designated on the original plat of said town, with the appurtenances, of the value of two thousand dollars; to have and to hold the same to the said John Doe, from the said first day of March, A. D. 1848, for the term of twenty years thence next ensuing.

And also, for that Lewis C. Wilson, a resident citizen of the State of New York, on the first day of March, A. D. 1848, at the district aforesaid, had demised to the said John Doe other lands and tenements, lying and being in the town of Lafayette, in the county of Tippecanoe and State of Indiana, to wit: Lots numbered ninety, (90,) ninety-four, (94,) ninety-five, (95,) and eighty-nine, (89,) as
3 designated on the original plat of said town, with the appurtenances, of the value of two thousand dollars; to have and to hold the same to the said John Doe, from the said first day of March, A. D. 1848, for the term of twenty years thence next ensuing.

And also for that Elias Butler, a resident citizen of the State of New York, on the first day of March, A. D. 1848, at the district aforesaid, had demised to the said John Doe other lands and tenements lying and being in the town of Lafayette, in the county of Tippecanoe and State of Indiana, to wit: Lots numbered ninety, (90,) ninety-four, (94,) ninety-five, (95,) and eighty-nine, (89,) as designated on the original plat of said town, with the appurtenances, of the value of two thousand dollars, to have and to hold the same to the said John Doe from the said first day of March, A. D. 1858, for the term of twenty years thence ensuing.

And also for that William Baldwin, a resident citizen of the State of Ohio, on the first day of March, A. D. 1848, at the district aforesaid, had demised to the said John Doe other lands and tenements lying and being in the town of Lafayette, in the county of Tippecanoe and State of Indiana, to wit: Lots numbered ninety, (90,) ninety-four, (94,) ninety-five, (95,) and eighty-nine, (89,) as designated on the original plat of said town, with the appurtenances, of the value of two thousand dollars, to have and to hold the same to the said John Doe from the said first day of March, A. D. 1848, for the
4 term of twenty years thence next ensuing. By virtue of which several demises the said John Doe entered into the said several tenements, firstly, secondly, thirdly, fourthly, and fifthly mentioned, with the appurtenances, and became and was thereof possessed for the several terms aforesaid. And the said John Doe, being so thereof possessed, the said Richard Roe afterwards, to wit, on the day and year aforesaid, with force and arms, entered into the said tenements, with the appurtenances, in which the said John Doe was so entered, in the manner and for the terms aforesaid, which is not yet expired, and ejected the said John therefrom, and other wrongs to the said John then and there did to his damage ten dollars. And therefore he sues by R. C. Gregory and H. C. Newcomb, his att'ys. Upon which declaration are the following endorsements, to wit: To Robert H. Cissua, Ama Walkling, Joseph Resta, Sarah Webb, senior, Owen T. Ball, Peter Ball, James Wallace, Mary P. Slaven, Mary Jane Fisher, and Joseph Cissua. I understand you are in possession of or claim title to the premises in this declaration mentioned, or to some part thereof; and I, being sued in this action as a casual ejector only, and having no claim or title to the same, do advise you to appear on the first day of the next term of the circuit court of the United States

for the district of Indiana, and make yourself defendants in my place and stead, otherwise judgement will then entered against me
5 by default, and you will be turned out of possession.
April.

RICHARD ROE.

UNITED STATES OF AMERICA,
District of Indiana.

In the circuit court of the U. S. for said district.

I, Sol. Merredith, of said district, did, on the 30th day of April, A. D. 1849, personally serve Robert H. Cissua, Ama Walkling, Joseph Resta, Sarah Webb, sen'r, Owen Ball, Peter Ball, James Wallace, Mary P. Slaven, Mary Jane Fisher, and Joseph Cissua, tenants in possession of the property in the declaration of ejectment hereunto annexed, mentioned with the said declaration, and the notice thereunto written, by delivering a true copy of the said declaration and notice to each of them the said Robert H. Cissua, Ama Walkling, Joseph Resta, Sarah Webb, s'n'r, Owen Ball, Peter Ball, James Wallace, Mary P. Slaven, Mary Jane Fisher, and Joseph Cissua, and he did, at the same time, read over the said notice to each of them the said Rober. H., Ama, Joseph Resta, Sarah, Owen, Peter, James, Mary P., Mary Jane, and Joseph Cissua, and explained to them, respectively, the intent and meaning of such service.

Given under my hand this 30th day of April, A. D. 1849.

S. MERREDITH,
Marshal of the U. S. for D. of Ia.
By JNO. TOUDREY.

It is hereby agreed that the foregoing declaration may be amended by striking out of each demise lot No. 91.

A. S. WHITE, *Att'y for Def't.*
R. C. GREGORY, *Att'y for Pl'ff.*

6 And afterwards, to wit, at the circuit court of the United States for the said seventh circuit and district of Indiana, begun and holden at Indianapolis, in the said district, on the twenty-sixth (26th) day of May, eighteen hundred and fifty-nine. Present: The honorable John McLean, judge of said circuit, and the honorable Elisha M. Huntington, judge of said district—

Comes now the plaintiff, by R. C. Gregory, his att'y, and on his motion the defendant is ruled to plead on or before the next calling of this cause, and day is given. And afterwards, to wit, at a circuit court of the United States for the said circuit and district aforesaid, holden at Indianapolis, as aforesaid, on the thirtieth (30th) day of May, in the year last aforesaid. Present: The said judges as last aforesaid—

Comes now Albert S. White, esq., and moves the court for leave to file. Consent rule, with blanks to be put in by clerk in vacation, which is granted, and filed in these words, to wit:

It is ordered by the court, by the consent of the att'ys of both parties, that the State Bank of Indiana, who claim title to the premises

described in the declaration in ejectment filed in the above-entitled cause, and for which she intends to defend this action in ejectment, may be admitted defendant instead of the non-defendant, Richard Roe. That the said defendant shall forthwith appear, by her attorney, and receive a declaration in ejectment for the above described premises, and plead thereto the general issue; and on
7 the trial thereupon to be had confess lease, entry, and austre, and that she was at the time of the service of the declaration in ejectment in possession of the said premises, and insist upon the title only; otherwise let judgement be entered for the plaintiff against the non-defendant by default.

R. C. GREGORY, *Att'y for Pl'ff.*
A. M. J. WHITE, *Att'y for Def'ts.*

And thereupon defendants file their plea herein in the words and figures following, to wit:

And the said defendant, by their att'y for plea, in this behalf, say: She is not guilty of the said supposed trespass and ejectment above laid to their charge in manner and form as the said John Doe hath above hereof complained against them, and of this she puts (herself) themselves upon the country, &c.

A. W. S. WHITE, *Att'y for Def'ts.*

It is agreed in the above case that the clerk in vacation may insert in the above consent rule and plea (as though inserted now) the names of such landlords, or persons claiming title, as shall be furnished him by def't's att'y, reserving to plaintiff the right to move at next term to strike out any such defendants as may be improperly admitted. May term, 1849.

R. C. GREGORY, *Att'y for Pl'ff.*
A. W. S. WHITE, *Att'y for Def't.*

This agreement is extended to the Nov. term of this court, to the first day thereof. May 30, 1849.

R. C. GREGORY, *Att'y for Pl'ff.*
A. S. WHITE, *For Def'ts.*

And this cause is continued until the next term of (this) court.

And this cause was continued from day to day, and term to
8 term, until the May term of court for the year eighteen hundred and fifty, (1850,) present the honorable Elisha M. Huntington, judge of said district, come the parties, by counsel, and by agreement this cause is continued, with leave to the defendant to fill up blanks in consent rule on or before the first day of the next term of this court.

And afterwards, to wit, at the November term of said court, for the year last aforesaid, present the same judge last aforesaid, come now the parties, by counsel, and by agreement this cause is continued until the next term of this court.

And afterwards, to wit, at the May term of said court for the year eighteen hundred and fifty-one, present the said judge as aforesaid,

come the parties, and this cause was continued from day to day, and term to term, to the twenty-fourth (24th) day of May, in the year eighteen hundred and fifty-four, (1854,) that being the ninth (9th) judicial day of the May term of the said court for the said year, present the said judge aforesaid, come the plaintiff, by his attorney, and the tenenants in possession, being each called, come not, but make default; and thereupon the State Bank of Indiana, claiming title to the premises described in the declaration herein, and by her attorney asks to be made defendant herein instead of Richard Roe, the casual ejector; and thereupon it is ordered by the court
9 that said State Bank be admitted such defendant upon filing her consent rule and plea of not guilty herein; and thereupon said State Bank of Indiana filed her consent rule and plea herein, as follows, to wit: It is ordered by the court, by the consent of the att'ys of both parties, that the State Bank of Indiana, who claims title to the premises described in the declaration in ejectment filed in the above-entitled cause, and for which she intends to defend this action of ejectment, may be admitted defendant instead of the non-defendant, Richard Roe; that the said defendant shall forthwith appear by her attorney and receive a declaration in ejectment for the above described premises, and plead thereto the general issue, and on the trial thereupon to be had confess lease, entry, and austre, and that she was at the time of the service of the declaration in ejectment in possession of said premises, and insist upon the title only; otherwise let judgement be entered for the plaintiff against the non-defendant by default.

R. C. GREGORY, *Att'y for Pl'ff.*
A. W. S. WHITE, *Att'y for Def'ts.*

And the said defendant, by their att'y for plea in this behalf, say that she is not guilty of the said supposed trespass and ejectment above laid to their charge in manner and form as the said John Doe hath above thereof complained against them, and of this she puts themselves upon the country, &c.

A. W. S. WHITE, *Att'y for Def'ts.*

And by agreement of the parties herein this cause is continued till the next term of this court. And this cause was further con-
10 tinued from day to day, and term to term, to the twenty-fourth (24th) day of November, in the year eighteen hundred and fifty-eight, that being the ninth (9th) judicial day of the November term of the said court for the said year last aforesaid, present the honorable Elisha M. Huntington, judge of said district, come the parties, by their attorneys, and by agreement of parties the trial of the issue joined herein is submitted to the court, a jury being waived by each party. The court, after hearing the evidence, and being fully advised, find that the title of the defendant is the paramount and better title; to which finding the plaintiff excepts, and the plaintiff moves the court to grant him a new trial, and files his motion and the reasons therefor, as follows:

The plaintiff names the court to grant him a new trial, for the following reasons: 1st. Because the court erred in overruling the plaintiff's objection to said trust deed as evidence; 2d, because the court erred in holding said trust deed valid and sufficient to carry the title as against the plaintiff's lessors.

GREGORY and JONES, *For Pl'ff.*

Which motion the court overrules; to the overruling of which motion the plaintiff excepts. It is, therefore, considered by the court that the defendant do have and recover of and from the lessors of the plaintiff the costs and charges herein. And the said plaintiff files two several bills of exception taken to the rulings of the court, in the words and figures following, to wit:

Bill of exception.

11 Be it remembered that the court, after hearing the evidence which elsewhere appears in this record and the agreement of counsel, held that the proceedings of this court under which the plaintiff's lessor makes title are all regular; that the marshal's sale was made at the usual place of making such sales, was regular, and in accordance with the recognized practice of this court at that time; and that the title of the plaintiff's lessor under said marshal's sale, and the proceedings subsequent thereto, are regular and sufficient to carry the title of the execution, defendants, and in nowise impeached or invalidated by any evidence offered for the purpose of impeaching it. The court further held that the trust deed elsewhere appearing in this record was valid and effectual in law to carry the title of David Webb, (under whom both parties claim;) that said deed was in nowise impeached by any evidence; and that the title of the defendant derived under said trust deed was the paramount and better title. After which determination of the court has been announced, and before the entry of the judgement herein, the plaintiff moved the court to grant him a new trial for the following reasons filed in writing: 1st. Because the court erred in overruling the plaintiff's objection to said trust deed as evidence. 2d. Because the court erred in holding said trust deed valid and sufficient to carry the title as against the plaintiff's lessors. Which motion the court overruled and entered final judgement, as elsewhere appears in this record. To the
12 overruling of which motion and entry of judgement, as aforesaid, the plaintiff at the proper time excepted, and prays this his bill of exceptions may be signed, sealed, and made a part of the record herein, which is done.

E. M. HUNTINGTON. [SEAL.]

Be it remembered that by agreement of the parties this case was submitted for trial to the court without the intervention of a jury; that on such trial the parties, plaintiff and defendant, agreed and admitted that David Webb was the owner in fee of the lands described in the declaration in this cause at the date and time of the execution

of the deed of trust to William N. Jemmers, which is below copied in the bill of exception; and that said Webb continued the owner thereof in fee simple untill the rendition of the judgement in the U. S. cir. court for the district of Indiana, a record of which is below made a part of this bill of exceptions, and also untill a sale of said land by the marshal of said district by virtue of an execution issued on said judgement. The deed executed in pursuance of which said sale is below made a part of this bill of exception, unless he, the said Webb, had been previously divested of such title by the said deed of trust.

And thereupon the plaintiff offered and read in evidence the following record, duly authenticated, of a judgement rendered in the U. S. cir. court for the district of Indiana, and also of an execution thereon issued, and also of the returns of the marshal of said district thereto:

"Pleas held before the honorable John McLean, one of the
13 associate judges of the Supreme Court of the United States, and the honorable Jesse L. Holman, district judge of the district of Indiana. Nov. term, eighteen hundred and thirty-eight.

GEORGE POMEROY, LEWIS C. WILSON, ELIAS BUTLER, and WILLIAM BALDWIN,
vs.
DAVID WEBB and ABRAM SHOEMAKER.

Case.

Be it remembered that on the 28th day of April, in the year of our Lord one thousand eight hundred and thirty-eight the plaintiffs, by their attorney, filed in the said court the following declaration, to wit:

"George Pomeroy, Lewis C. Wilson, Elias Butler, and William Baldwin, who are resident citizens of the State of New York, partners, trading and doing business under the name and firm of Pomeroy, Wilson & Butler, plaintiffs, by Fletcher and Butler, their attorney, complain of David Webb and Abraham Shoemaker, who are resident citizens of the State of Indiana, defendants in custody, &c., of a plea of trespass on the case upon premises. For that whereas heretofore, to wit, on the fifth day of August, in the year 1836, at New York, to wit, at the district of Indiana aforesaid, the said defendants, who then were and still are resident citizens of the State of Indiana, by the name and description of Webb & Shoemaker, made their promissory note in writing, bearing date the day and year aforesaid, and thereby then and there promised to pay, twelve months after the date thereof, to the said plaintiff, by the name and description of Pomeroy, Wilson and Butler, the sum of seven hundred and sixty
14 dollars and eight cents, at the branch of the State Bank of Indiana at Lafayette, for value received, and then and there delivered the said promissory note to the said plaintiffs, who then were and still are resident citizens of the State of New York. By means whereof, and by force of the statute in such cases made and provided,

the said defendants then and there became liable to pay to the said plaintiffs the said sum of money in said promisary note specified, according to the tenor and effect thereof; and being so liable they, the said defendants, in consideration thereof, afterwards, to wit, on the day *day*, year last aforesaid, undertook and then and there faithfully promised the said plaintiffs to pay the said sum of money in said promisary note specified according to the tenor and effect thereof. And the said plaintiffs, in fact, say that the said sum of money has been long since due and payable according to the tenor and effect of said promisary note.

And whereas also, afterwards, to wit, on the twelfth day of August, in the year 1837, at New York, to wit, at the district of Indiana, the said defendants, who then were and still are resident citizens of the State of Indiana, by the name and description of Webb & Shoemaker, made their certain promisary note in writing, bearing date the day and year last aforesaid, and thereby then and there promised to pay, six months after the date thereof, to the order of the
15 said plaintiffs, by the name and description of Pomeroy, Wilson & Butler, the sum of three hundred dollars and fifty-four cents, at the branch of the State Bank of Indiana at Lafayette, for value received; and then and there delivered the said last mentioned promisary note to the said plaintiffs, who then were and from thence hitherto have been and still are resident citizens of the State of New York. By means whereof, and by virtue of the statute in such cases made and provided, the said defendant then and there became liable to pay to the said plaintiffs the said sum of money in the said last-named promisary note specified, according to the tenor and effect thereof, and being so liable they, the said defendants, in consideration thereof afterwards, to wit, on the day and year last aforesaid, undertook and then and there promised the said plaintiffs to pay them the said sums of money in the said last-mentioned promisary note specified, according to the tenor and effect thereof, and being so liable they, the said defendants, in consideration thereof afterwards, to wit, on the day and year last aforesaid undertook and then and there promised the said plaintiffs to pay them the said sum of money in the said last-mentioned promisary note specified, according to the tenor and effect thereof; and the said plaintiffs, in fact, say that the said last-mentioned sum of money have been long since due and payable according to the tenor and effect thereof, and the said plaintiffs, in fact, say that the said last-mentioned sum of money has been
16 long since due and payable according to the tenor and effect thereof, and the said plaintiff, in fact, say that the said last-mentioned sum of money has been long since due and payable according to the tenor and effect of said last-mentioned promisary note.

And whereas, also, afterwards, to wit, on the first day of March, A. D. 1838, at the district of Indiana aforesaid, the said defendants, then and still being resident citizens of the State of Indiana, were indebted to the said plaintiffs, and still being resident citizen of the State of New York, in the further sum of twelve hundred dollars, for divers goods, wares, and merchandize by the said plaintiffs before

that time sold and delivered to the said defendants, and at their special instance and request; and also in the further sum of twelve hundred dollars for so much money by the said plaintiffs before that time lent and advanced to, and paid, laid out, and expended for the said defendants, and at their like special instance and request; and also in the further sum of twelve hundred dollars for so much money by the said defendants before that time had and received to and for the use of the said plaintiffs, and being so indebted they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the district of Indiana aforesaid, and then and there faithfully promised the said plaintiffs to pay them the said several sums of money in this count mentioned whenever they, the said defendants, should be thereunto afterwards requested. Nevertheless, the said defendants, not regarding their said several
17 promises and undertakings, have not as yet paid the said several sums of money or any or either of them, or any part thereof, to the said plaintiffs, although often requested so to do; but to pay the same the said defendants have hitherto wholly neglected and refused, and still do neglect and refuse so to do, to the damage of the said plaintiffs of two thousand dollars, hence they sue.

And afterwards, to wit, on the first day of the term aforesaid, the plaintiffs, by Fletcher, their attorney, come and the following judgement is rendered, to wit:

GEORGE POMEROY, LEWIS C. WILSON, ELIAS BUTLER, and WILLIAM BALDWIN
vs.
DAVID WEBB and ABRAHAM SHOEMAKER.
} Case on promises.

The plaintiff, by Fletcher and Butler, their attorneys, come, and the defendants, being three times loudly called, come not, but herein wholly make default; and it appearing to the satisfaction of the court that process in this case had been duly served more than thirty days before the first day of the present term of this court, it is therefore considered by the court now here that the plaintiff recover of the defendants the sum of eleven hundred and twenty-five dollars and thirty-one cents, in damages, by reason of the non-performance of the several promises and undertakings in the plaintiffs' declaration mentioned, as well as the sum of thirty-six dollars and nineteen cents, their costs and charges in this behalf laid out and expended, and the defendants in mercy, &c.

And afterwards, on the seventeenth day of December, 1838,
18 there was issued from the clerk's office of said court a writ of execution, which is in the words and figures following, to wit:

The President of the United States of America to the marshal of the district of Indiana, greeting:

You are commanded that of the goods and chattels, lands and tenements of David Webb and Abraham Shoemaker to be found in your district, you cause to be made the sum of eleven hundred and twenty-

five dollars and thirty-one cents, with interest thereon from the nineteenth day of November last past, which George Pomeroy, Lewis C. Wilson, Elias Butler, and William Baldwin lately recovered in our circuit court against, for their damages which in the said court by the judgement thereof was adjudged to the said George Pomeroy, Lewis C. Wilson, Elias Butler, and William Baldwin; and also the sum of thirty-six dollars and nineteen cents for their costs and charges in that behalf expended, whereof the said David Webb and Abraham Shoemaker are convicted, as appears of record; and have the money at the clerk's office of our said court on the first Monday in April next. And have you then and there this writ.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, and the seal of this court at Indianapolis, this 17th day of December, 1838.

[L. S.]

HORACE BASSETT, *Clerk*.

That afterwards, on the 20th day of May, A. D. 1839, the marshal for said district returned said writ of execution, with his proceedings thereon in the words and figures following, to wit:

19 The within annexed writ of execution in case of George Pomeroy, Lewis C. Wilson, Elias Butler, and William Baldwin *vs.* David Webb and Abraham Shoemaker, came to hand on the 19th day of December, 1838. On the 27th day of December, 1838, by virtue of the within annexed writ of execution, the defendants herein having no personal property whereon to levy, I levied upon, seized, and took in execution as the property of said defendants, David Webb and Abraham Shoemaker, all the following described tracts and parcels of land and lots and premises, situated in the said district of Indiana, to wit:

The west half of the northwest quarter of section thirty-two, in township twenty-three north of range four west; the next half of the southwest quarter of the same section, township, and range; one equal and undivided fifth part of lot number ten, (10,) of the school section in the same township and range aforesaid; lots numbered ninety, (90,) ninety-one, (91,) ninety-four, (94,) ninety-five, (95,) and eighty-nine, (89,) in the town of Lafayette and county of Tippecanoe, as designated on the original plat of said town; lots numbered five, (5,) thirty-eight, (38,) fifty nine, (59,) sixty-five, (65,) fifty-four, (54,) sixty-six, (66,) and seventy-one, (71,) in the town of Americus in said county of Tippecanoe, as designated on the plat of said town as laid off by William Digley; also lots numbered one hundred and five, (105,) seventy-nine, (79,) ninety-six, (96,) and eighty-two, (82,) in said town of Americus.

And afterwards, to wit, on the day of , in the
20 year of 1839, at the State-house door, in the town of Indianapolis, in the county of Marion and State and district aforesaid, first having given due and timely notice of the time and place of sale, as required by law, and having first then and there offered for sale the rents and profits for the term of seven years of all the said lands, lots, and premises, and having no bid therefore, I did then

and there, by virtue and in pursuance of the said writ of execution, expose to sale, and then and there sell to George Pomeroy, Lewis C. Wilson, Elias Butler, and William Baldwin, all the above described tracts and parcels of land, lots, and premises, in fee simple, for the sum of sixty dollars, they being the highest bidders, and that the highest and best price bid or offered for the same said land, lots, and premises so having been sold separately, and said sum being the aggregate amount of said sale, which sum has been duly accounted for and settled by said purchasers.

SAMUEL TAYLOR,
Marshal Indiana District.
P'r C. J. HAND, *Dep'ty.*

I, Horrace Bassett, clerk of said court, do hereby certify the above and foregoing transcript to be a full, true, and complete copy of the record in the above-entitled cause—the first execution and the marshal's return thereon.

In testimony whereof, I have hereunto set my hand and affixed the [L. S.] seal of said court, at Indianapolis, this 20th day of September, A. D. 1849.

H. BASSETT, *Clerk.*

21 The plaintiff then offered in evidence the following deed of conveyance, executed by Jesse D. Bright as marshal of said district, (the execution of which is duly proved,) to the introduction of which, in evidence, the defendants objected on the following grounds:

1st. The said deed discloses that said sale was had at Indianapolis, a place remote from said property sold, and more than sixty miles distant therefrom.

2d. The deed contains no evidence on its face, nor has any been given on the trial, that the property sold was advertised in a newspaper printed and published in the said county of Tippecanoe where said land is located.

But the court overruled said objections, and allowed said deed to be read in evidence, and the same was accordingly read in evidence, as follows:

Whereas, at the November term, for the year 1838, of the circuit court of the United States for the 7th circuit and district of Indiana, in a certain suit then therein depending, wherein George Pomeroy, Lewis C. Wilson, Elias Butler, and William Baldwin were plaintiffs, and David Webb and Abraham Shoemaker, defendants, the said plaintiffs, by the consideration and judgement of the said court, recovered judgement against the said defendants, the sum of eleven hundred and twenty-five dollars and thirty-one cents for their damages therein, together with costs of suit taxed at thirty-six dollars and nineteen cents.

Upon which said judgement a writ of execution afterwards, on the 17th day of December, 1838, was duly and regularly issued
22 and directed to the marshal of the said district of Indiana,

commanding him, the said marshal, that of the goods and chattels, lands and tenements of the said defendants to be found in said district, he should cause to be made the said sum of eleven hundred and twenty-five dollars and thirty-one cents, the damages aforesaid, and also the said sum of thirty-six dollars and nineteen cents, the said costs; and that he should have these moneys at the clerk's office of said court, at Indianapolis, on the first Monday in April next thereafter, and have then there that writ.

Which said writ of execution, duly attested, was afterwards and before the return day thereof, that is to say, on the 19th day of December, A. D. 1838, delivered to Gamaliel Taylor, then the marshal of the district of Indiana, to be executed; by virtue and in pursuance of which said writ of execution the said Taylor, so being such marshal as aforesaid, afterwards and before the return day of said writ of execution was so in his hands, the said defendants having no personal property whereon to levy, did levy upon, seize, and take on execution as the property of said defendants, David Webb and Abraham Shoemaker, all the following described tract and parcel of land, lots, and premises, situated in the said district of Indiana, to wit:

The west half of the northwest quarter of section thirty-two, in township twenty-three north, of range four west; the west half of the southwest quarter of the same section, township, and range;
23 one equal undivided fifth part of lot numbered ten, of the school section in the same township and range; lots numbered ninety, (90,) ninety-one, (91,) ninety-four, (94,) ninety-five, (95,) and eighty-nine, (89,) in the town of Lafayette and county of Tippecanoe, as designated on the original plat of said town; lot numbered five, (5,) fifty-four, (54,) 38, 58, and 65, sixty-six, (66,) and seventy-one, (71,) in the town of Americus in said county of Tippecanoe, as designated on the plat of said town as laid off by William Digly; also lots numbered one hundred and five, (105,) seventy-nine, (79,) ninety-six, (96,) and eighty-two, (82,) in said town of America.

And afterwards and before the return of said writ of execution, and while the same remained in the hands of the said Taylor, so being such marshal as aforesaid, that is to say, on the —— day of ———, in the year 1839, at the court-house door in the town of Indianapolis, in said State and district of Indiana, and after having given due and timely notice of the time and place of sale, and after having then and there offered for and exposed to sale the rents and profits, for the term of seven years, of all the said lots, lands, and premises, and having no bid or offer, therefore the said Gamaliel Taylor, so being such marshal as aforesaid, offered for and exposed to sale, and then and there sold, at public auction, to George Pomeroy, Lewis C. Wilson, Elias Butler, and William Baldwin, in fee simple, all the said above-mentioned and described lots, tracts, and parcels of land and premises so levied on as aforesaid, for the price and sum of sixty dollars, then and
23 by their bid, and paid therefore. They being then and there the highest bidders, and that the highest and best price bid or offered for the same said lots and tracts and parcels of land having

been so sold repeatedly, and said sum being the aggregate amount of said sale.

A return whereof was duly made by the said Taylor, marshal as aforesaid, together with the writ of execution, according to the exigencies thereof. And whereas, also, afterwards at the May term, 1840, of the said court, on the application of the said purchasers, and the fact herein above stated being made known to said court, and it further then and there appearing to the satisfaction of the court that the said Gamaliel Taylor, whose term of office as marshal as aforesaid had before that time expired, had not during his continuance in office executed to the said purchasers any deed or deeds of conveyance of the premises so sold to them as aforesaid, it was ordered by the said court that Jesse D. Bright, the then and now marshal of the said district of Indiana, make and execute to the said purchases good and sufficient deed or deeds of conveyance, in fee simple, of all the said lots and tracts and parcels of land and premises so sold to them as aforesaid, in conformity of said sales. All of which, by the records and papers now in said court remaining, will more fully and at large appear.

Now, therefore, know ye that I, Jesse D. Bright, marshal of the district of Indiana, for and in consideration of the premises and of
25 the full payment of the said sum of sixty dollars, as above stated, have granted, bargained, sold, and confirmed by these presents, do grant, bargain, sell, convey, and confirm unto the said George Pomeroy, Lewis C. Wilson, Elias Butler, and William Baldwin, their heirs and assigns forever, each and every and all the said above-mentioned and described lots, tracts, and parcels of land so sold to them as aforesaid, together with all and singular the hereditaments and appurtenances to the same belonging or in anywise appertaining ; and the reversions, remainders, rents, issues, and profits thereof, and all the estate, right, title, and interest, property, claim, and demand whatever of them, the said David Webb and Abraham Shoemaker, or of either of them, of, in, and to said premises, and every part and parcel thereof, and which was in anywise subject or liable to be so levied upon and sold by virtue of said writ of execution, to have and to hold the said premises with the appurtenances and every part and parcel thereof, to the only proper use, benefit, and behoof of the said George Pomeroy, Lewis C. Wilson, Elias Butler, and William Baldwin, their assigns and heirs forever.

In witness whereof, I, the said Jesse D. Bright, marshal as aforesaid, have hereunto set my hand and seal on this the nineteenth day of August, in the year A. D. 1840.

JESSE D. BRIGHT. [SEAL.]
Marshal of the District of Indiana.

Signed, sealed, and delivered in presence of—
JOHN L. KITCHEM.

STATE OF INDIANA, *Marion Co. ss :*

26 Before me, the undersigned, justice of the peace in and for said county, personally came Jesse D. Bright and acknowldged

the within indenture to be his voluntary act and deed as marshal as aforesaid for the purposes therein contained.

Given under my hand and seal this 19th August, 1840.

JOHN L. KETCHAM. [SEAL.]

STATE OF INDIANA, *Marion County, ss:*

I, William Stewart, clerk of the circuit court within and for the county of Marion aforesaid, do hereby certify that John L. Ketcham, whose certificate of acknowledgement appears to the instrument of writing (a deed) to which this is attached, was, on the date at the time of making said certificate, to wit, the nineteenth day of August, A. D. 1840, an acting justice of the peace within and for said county of Marion, duly elected, commissioned, and qualified, and that full faith and credit ought to be given to his official acts.

In witness of which I hereunto affixed the seal of said court [L. S.] and subscribed my name at Indianapolis this twenty-first day of February, A. D. 1853.

WILLIAM STUART, *Clerk.*

Rec'd for record June 22d, 1841, and recorded in book 21, pages 79, 80, and 81.

SANDFORD C. COX,
Recorder for Tippecanoe, Ia.

The plaintiff then read in evidence the following statement and agreement:

Name of marshal making the seal: W.

27 FOOT and BOWLER *vs.* JOHN CLYMER. } 1st Taylor.

Sale 3d Feb., 1838, at Peru, lands in Miami co.; Alexander Wilson, purchaser; place of advertisement not named.

ROBERT and WHITE *vs.* WELLS, BRADLEY and PATTON. } 2d Bright.

Sale 6 Feb'y, '41, at Indianapolis; lands in Tippicanoe co.; Andrew Ingram, purchaser; adv't at Lafayette, in paper.

JOHN A. SIMPSON *vs.* JAMES COMSTOCK. } 3d Taylor.

Sale 18 February, 1839, at Indianapolis; lands in Kosciusco co.; purchasers, Blair and others; place of adv't not shown.

SPERING *et al.* *vs.* THATCHER *et al.* } 4th.

Sale 15 May, '41, at Indianapolis; lands in Shelby co.; purchasers, Ovid Butler and others; adv't in an Indianapolis and a Lafayette

paper; lands rear lots in Shelbyville and lands in T. 13, R. 7 E., and T. 13, R. 6 E., T. 14, R. 6 E., T. 121, R. 7 E., T. 13, R. 4 E., T. 38, R. 3 W.

REEVES and MCLEAN. *vs.* WILLIAM HUNT. } 5th.

28 Sale 18 January, '40, at Indianapolis; lands in Shelby co.; purchaser. Reeves; adv't, place not named.

SHERRILL *vs.* THATCHER and WALKER. } 6th Bright.

Sale 15 May, '41, at Indianapolis; lands in, &c., same No. 4.

JOHN A. SIMPSON *vs.* STANISLAUS LASSELLE *et al.* } 7th Taylor.

Place of sale, &c., not shown.

JOHN A. SIMPSON *vs.* HYACINTH LASSELLE. } 8th Taylor.

Sale 28 and 25 Sept., '39; sold in counties where lands lie, except lot 32 in Logansport; this sold 16 May, 1840, at Indianapolis; Calvin Fletcher, purchaser.

WINSTON *vs.* MILLER and MUDGE. } 9th Taylor.

Sale 26 Jan., '39; adv. and sold in Cass co., where lands lie; purchasers, Denekle *et al.*

RAMSEY *vs.* DAVIS, DAVIS & PATTON. } 10th Bright.

29 Sale 13 March, 1841, at Indianapolis; lands in Tippecanoe co.; adv't at Lafayette; and Ingram, purchaser.

JOHN A. SIMPSON *vs.* COMSTOCK. } 11th.

Sale 13 Feb'ry, 1839, at Indianapolis; land, Kosiosco; adv't in that co.; Simpson, purchaser.

LAWRENCE & Co. *vs.* BISHOP. } 14th.

Sale 26 June, '39; place not named; adv't at Indianapolis; lands in Porter co.; John Osburn, purchaser.

POMEROY *et al.*
vs.
HUGH HANNA. } 13th Taylor.

Sale 10 Feb'y, '40, at Indianapolis; lands in Wabash co.; adv't in Miami co.

JAMES HALL
vs.
HYACINTH LASSALLE. } 14th.

Nothing shown.

BISHOP
vs.
POLLOCK *et al.* } 16th Taylor.

Sale 25 May, '40, at Indianapolis; lands in Ripley co.; adv't not shown; Stephen C. Stephens, James Morrison, and Calvin Fletcher, purchasers.

30 TIFFANY
vs.
PATTON. } 16th Bright.

Sale 13 March, 1841, at Indianapolis; lands in Tippecanoe co.; adv't in co.; and Ingram, purchaser.

BLACHLEY *et al.*
vs.
POLKE. } 17th Taylor.

Place not named.

WEED
vs.
LUIGEE. } 18th Taylor.

Sale 25 Jan'y, '40, at Indianapolis; lands in Miami co.; adv't in the co.; Weed, purchaser.

BLACHLEY *et al.*
vs.
LASSELLE. } 19th.

4 cases; place not named.

COUERET,
vs.
BENBREDGE. } 20 Taylor.

Sale 11 April, '40, at Indianapolis; lands in Brown co.; adv't at Indianapolis; Coueret, purchaser.

31 SPERING *et al.*
vs.
POLLOCK. } 21 Taylor.

Sale 25 May, '40, at Indianapolis; adv't not stated; Herins and James Morrison, bidders; sale 1st Jan'y, '40, at Indianapolis.

FLEMING, MCINTIRE & Co. *vs.* MERRILL. } 22d.

Sale 15th Jan., '40, at Indianapolis; lands in Fountain co.; adv't not stated.

POMEROY *et al.* *vs.* BENBRIDGE. } 23d Bright.

Sale 15th Nov., '41, at Indianapolis; lands in Brown and Warren co's; adv't not stated; Rufus A. Lockwood purchaser.

VARNUM *vs.* ENSUNYER. } 24th Bright.

Sale 3 Oct., '40, at Indianapolis; adv't at Indianapolis.

GAUM *et al.* *vs.* UUHLIS. } 25th.

Sale 5th April, '41, at Indianapolis; lands in Vermillion; adv't in co·

32 SIMPSON *vs.* WALKER. } 26th Taylor.

Sale 6 April, '40, at Indianapolis; lands in Laporte; adv't at Laporte and at Indianapolis.

U. STATES. *vs.* MORGAN and MCILVAINE. } 27th.

Place of sale not shown.

POMEROY *et al.* *vs.* RUFUS WEBB *et al.* } 28th.

Sale 26 March, 1840, at Indianapolis; adv't not shown; lands in Warren.

E. CROW & Co. *vs.* UMKLE and UMKLE. } 29th Howard.

Sale 18 July, '40, at Delphi; lands in Carrol co.; adv't at Indianapolis.

F. BROWNSON *et al.* *vs.* WADE *et al.* } 30th Bright.

Sale 1st March, '41, at Indianapolis; adv't at Lafayette, Tippecanoe co.; lands in Fountain co.

The foregoing memorandum shows all execution sales had under executions issued from the United States circuit court for the district of Indiana from the organization of the court to the time of
33 the adoption of the rules at May term of said court for 1841. The memorandum was taken from the execution docket, and shall be received as evidence of the facts stated in the memanandum to the same extent and for the same purpose as if the original executions and returns were offered as evidence on the trial of the case of Doe *ex dem.* Pomeroy *et al. vs.* The State Bank of Indiana pending in said U. S. circuit court. But this agreement not to be regarded as a waiver of any objections to the competency or relevancy of said evidence that might be taken if the original executions, &c., were produced. It is further agreed that all sales on execution from said court were, after the adoption of said rules at the May term, 1841, made in the counties were the lands were situated.

V. Y. BAIRD, *Att'y for Def't.*
R. JONES, *for Pl'ff.*

June 24, 1858.

To the reading of which the defendant objected as irrelevant, and excepted to the overruling of said objection. The plaintiff then offered and read in evidence the following transcript and agreement:

Be it remembered that among the records of the circuit court of the United States for the seventh judicial circuit and district of Indiana are the following, to wit:

GEORGE POMEROY, LEWIS C. WILSON, ELIAS BUTLER, and WILLIAM BALDWIN,
vs.
DAVID WEBB and ABRAHAM SHOEMAKER. } No. 1.

The President of the United States of America to the marshal of the district of Indiana, greeting:

34 You are hereby commanded that of the goods and chattels, lands and tenements, of David Webb and Abraham Shoemaker, to be found in your district, you cause to be made the sum of eleven hundred and twenty-five dollars and thirty-one cents, with interest thereon from the nineteenth day of November last past, which George Pomeroy, Lewis C. Wilson, Elias Butler, and William Baldwin lately recovered in our circuit court against them for their damages, which in the said court, by the judgement thereof, was adjudged to the said George Pomeroy, Lewis C. Wilson, Elias Butler, and William Baldwin, and also the sum of thirty-six dollars and nineteen cents for their costs and charges in that behalf expended; whereof the said David Webb and Abraham Shoemaker are convicted, as appears of record, and have the money at the clerk's office of our said court, at Indianapolis, on the first Monday in April next. And have you then and there this writ.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, and the seal of this court, at Indianapolis, this 17th day of December, 1858.
[L. S.]

HORACE BASSETT, *Clerk.*

Which execution was delivered to the marshal of the said district of Indiana, and by him returned, with the following endorsement thereon, to wit :

The within and annexed writ of execution in the case of
35 George Pomeroy, Lewis C. Wilson, Elias Butler, and William Baldwin, *vs.* David Webb and Abraham Shoemaker, came to hand on the 19th day of December, 1838.

On the 27th day of December, 1838, by virtue of the within and annexed writ of execution, the defendants therein having no personal property whereon to levy, I levied upon, seized, and took in execution as the property of said defendants, David Webb and Abraham Shumaker, all the following described tracts and parcels of land, and lots, and premises, situate in the said district of Indiana, to wit : The west half of the northwest quarter of section thirty-two, in township twenty-three north, of range four west ; the west half of the southwest quarter of the same section, township, and range ; one equal and undivided fifth part of lot numbered ten of the school section in the same township and range aforesaid ; lots numbered ninety, (90,) ninety-one, (91,) ninety-four, (94,) ninety-five, (95,) and eighty-nine, (89,) in the town of Lafayette and county of Tippecanoe, as designated on the original plat of said town ; lots numbered five, (5,) thirty-eight, (38,) fifty-nine, (59,) sixty-five, (65,) fifty-four, (54,) sixty-six, (66,) and seventy-one, (71,) in the town of Americus, in said county of Tippecanoe, as designated on the plat of said town, as laid off by William Digly; also lots numbered one hundred five. (105,) seventy-nine, (79,) ninety-six, (96,) and eighty-two, (82,) in said town of Americus.

And afterwards, on the day of , in the year 1839, at the State-house door, in the town of Indianapolis, in the county
36 of Marion and State and district aforesaid, first having given due and timely notice of the time and place of sale, as required by law, (and first having then and there offered for sale the rents and profits, for the term of seven years, of all the said lands, lots, and premises, and having no bid therefore,) I did then and there, by virtue and in pursuance of the said writ of execution, expose to sale, and then and there sell to George Pomeroy, Levi C. Wilson, Elias Butler, and William Baldwin all the said above-described tracts and parcels of land, lots, and premises in fee simple, for the sum of sixty dollars, they being the highest bidders, and that the highest and best price bid or offered for the same. Said lands, lots, and premises having been sold seperately, and said sum being the aggregate amount of said sale, which sum has been duly accounted for and settled by said purchers.

GAM'L TAYLOR, *Marshal Indiana District,*
Per C. J. HAND, *Deputy.*

And afterwards, to wit, at a circuit court of the United States for the seventh judicial circuit and district of Indiana, begun and holden at Indianapolis, in said district of Indiana, on the twenty-first (21) day of May, in the year of our Lord eighteen hundred and forty,

that being the (4th) fourth judicial day of the May term of said court for the year (1840) aforesaid. Present, the honorable John McLean, judge of said circuit, and the honorable Jesse L. Holman, judge
37 of said district. Now come Pomeroy, Wilson & Butler, and on the application filed in these words and figures, to wit:

To the honorable the judges of the circuit court of the United States for the 7th circuit and district of Indiana, at May term, 1840.

Your petitioners, George Pomeroy, Lewis C. Wilson, Elias Butler, and William Baldwin, would respectfully represent to your honors that at the November term, for the year 1838, of this court, your petitioners recovered in this court a judgement against David Webb and Abraham Shoemaker for the sum of $1,125 31; and that afterwards, on the 17th day of December, in the year 1838, your petitioner legally sued out a writ of execution upon the said judgement, and on the 19th day of the same month put the said writ of execution into the hands of Gamaliel Taylor, esq., then the marshal of the district of Indiana. Which said writ the said marshal, on the 27th day of the same month, viz: December, 1838, levied upon the following described lands, situate in the said district of Indiana, to wit:

The west half of the northwest quarter of section thirty-two, in township twenty-three north, of range four west; the west half of the southwest quarter of the same section, township, and range; one equal and undivided fifth part of lot numbered ten of the school section, in the township and range aforesaid; lots numbered ninety, (90,) ninety-one, (91,) ninety-four, (94,) ninety-five, (95,) and eighty-nine, (89,) in the town of Lafayette and county of Tippecanoe, designated on the original plat of said town; lots numbered five, (5,)
38 thirty-eight, (38,) fifty-nine, (59,) sixty-five, (65,) fifty-four, (54,) sixty-six, (66,) and seventy-one, (71,) in the town of Americus, in said county of Tippecanoe, as designated in the plat of said town, as laid off by William Digly; also lot numbered one hundred and five, (105,) seventy-nine, (79,) ninty-six, (96,) and eighty-two, (82,) in said town of Americus, as the property of the said Webb and Shoemaker. Which said lands and premises the said marshal afterwards, on the day of , in the year 1839, under and in pursuance of said writ of execution, legally sold to your petitioner, at public auction, for the price and sum of sixty dollars, which sum has been fully paid by your petitioner to said marshal; all of which will more fully at large appear by the said writ of execution and the return thereof, duly made by the said marshal, now on file in the office of the clerk of this court, to which your petitioners refer your honors. And your petitioners further state that no deed of conveyance of said premises so purchased by him has as yet been executed by said marshal, and that by reason of the expiration of the term of service of said Taylor as marshal, as aforesaid, he is now incompetent to make such deed. Wherefore your petitioners prays your honors to order and direct the now marshal of the district of Indiana to make and execute to said such deed of conveyance in fee of the said lands and premises so sold to him, as aforesaid, and your petitioners will ever

pray, &c. And it appearing to the satisfaction of the court
39 by a writ of execution issued heretofore out of the clerk's office of this court, on the 17th day of December, 1838, and by the marshal's return thereto. as endorsed thereon in the case of Pomeroy, Wilson & Butler against Webb and Shoemaker, that Gama'l Taylor, the former marshal of the district of Indiana, to whom said writ of execution was directed and delivered as such marshal, and by virtue of said writ legally and duly sold to said Pomeroy, Wilson, and Butler, the said applicants, the said lands and premises named in said petition and in said return on said writ, and that the purchase money thereof has been duly paid upon said execution by said purchaser; and it appearing further that since said sale the term of service of said marshal, Gam'l Taylor, has expired, and that, through inadvertance or delay, no deed of conveyance has been made by said Taylor, being such marshal, as aforesaid, to said Pomeroy. Wilson & Butler: It is therefore ordered that Jesse D. Bright, the now marshal of the district of Indiana, do make and execute a deed of conveyance to said Pomeroy, Wilson & Butler, in fee simple, of all said lands, lots, and premises so sold to him, as aforesaid, as named in the said return in said writ of execution, according to the tenor and effect of said sale.

GEORGE POMEROY, LEWIS C. WILSON, ELIAS BUTLER & WILLIAM BALDWIN,
vs.
RUFUS WEBB, DAVID WEBB, ABRAHAM SHOEMAKER, SAMUEL M HARRIS, & CHESTER TUTTLE. } No. 21.

40 *The President of the United States of America to the marshal of the district of Indiana. greeting:*

You are hereby commanded that of the goods and chattels, lands and tenemants, of Rufus Webb, David Webb, Abraham Shoemaker, Samuel M. Harris, and Chester Tuttle, within said district, you cause to be made the sum of fifteen hundred and fifty-six dollars and fifty-four cents, being the penal amount of a bond by them given on the twenty-fifth day of December, 1838, on replevying for the term of one hundred and eighty days from the 21st day of November, 1838, a judgement then rendered in the circuit court of the United States for the district of Indiana, by the consideration and judgement of the judges thereof, against said Rufus Webb, David Webb, and Abraham Shoemaker for the sum of seven hundred and forty-three dollars and twenty-three cents, which in the said court, by the judgement thereof, was adjudged George Pomeroy, Lewis C. Wilson, Elias Butler, and William Baldwin, as well as the sum of thirty-four dollars and fifty-eight cents, for their costs and charges in that behalf laid out and expended, which term of 180 days from said twenty-first day of November, 1838, has fully elapsed, and the said bond and judgement thereby replevied, remain wholly unpaid and unsatisfied, and in full force in law, whereof the said Rufus Webb, David Webb, Abraham Shoemaker, Samuel W. Harris, and Chester Tuttle

41 are convicted, as appears to us of record. Have you those moneys before the judges of said court, at Indianapolis, on the first Monday of December next, then and there to render unto the said George Pomeroy, Lewis C. Wilson, Elias Butler, and William Baldwin aforesaid. And have then there this writ.

[L. S.] Witness honorable Roger B. Taney, chief justice of the Supreme Court of the United States, and the seal of said court, at Indianapolis, the twenty-second day of August, 1839.

H. BASSETT, *Clerk.*

Which execution was duly delivered to the marshal of the said district of Indiana, and by him returned with the following endorsement, to wit:

"Come to hand 22d August, 1839.

"GAM'L TAYLOR, *M. A. D.*,
"Per C. J. HAND, *Deputy.*"

I have levied this execution on the following property given up to satisfy the within judgement, to wit: The SE. fraction of section fourteen, township No. 22 N., range 7 west, containing 88 $\frac{92}{100}$ acres. Also an out-lot containing 5 acres, adjoining the town of Independence, Warren co., Ia., to wit: E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of section 22, T. 22 N., R. 7 W., (more fully described in a letter bearing date Nov. 28, 1839.) Also 20 feet of the NE. end of lot No. 65, in the town of Independence, Warren co., Ia., deeded from R. Webb to Samuel M. Harris. Also the west half of the southwest qr. of sec. 35, in town. 23 N., range 8 west, containing 80 acres, deeded by Jacob Dixon to Webb & Harris on 11th Dec., 1838.

42 Also steamboat Rover, now lying in the Wabash river, at Goodman's Landing, near Terre Haute, with her engines, fixtures, and furniture, this 17th Sept., 1839.

G. TAYLOR, *M. I. D.*,
Per C. J. HAND, *Dep.*

And after having legally advertised the above lands for sale, I did, on the twenty-sixth day of March, eighteen hundred and forty, between the hours of 10 o'clock a. m. and 4 o'clock p. m., at the door of the State-house, in the town of Indianapolis, in the county of Marion and State of Indiana, by public auction, first exposed to sale the rents and profits of the said lands for the term of seven years for sale; and no person bidding for the same, I then and there, by public auction as aforesaid, offered the fee simple for sale of the west half of the southwest quarter of section thirty-five, in township twenty-three north, of range eight west, situate in the county of Warren and State of Indiana, all the estate, right, and title of the said Rufus Webb, David Webb, Abraham Shoemaker, Samuel M. Harris, and Chester Tuttle, or either of them, in and to the same; and Archibald C. Olds did then and there bid for the same the sum of three hundred dollars, and no person bidding more, the said tract or parcel of land, with the appurtenances, was, in due form of law, openly struck

off and sold to the said Archibald C. Olds for the said sum of three hundred dollars, he being the highest bidder and that being the highest and best price bidden for the same.

43 And afterwards and after having legally advertised for sale the balance of said lands, which were not sold, I did, on the fourteenth day of January, eighteen hundred and forty-one, between the hours of 10 o'clock a. m. and 4 o'clock p. m., at the door of the State-house, in the town of Indianapolis, in the county of Marion and State of Indiana, by public auction, first expose to sale the rents and profits of all of said lands, which, not been sold for the term of seven years, and no person bidding for the same, I then and there offered, by public auction as aforesaid, the fee simple off of the north or northeast end of lot No. sixty-five, in the town of Independence, in the county of Warren and State of Indiana; and the fee simple of the east half of ten acres of the northeast quarter of the west half of the northeast quarter of section twenty-two, in township twenty-two north, of range seven west, containing five acres, more or less, and being one half of the following described premises, to wit: Beginning at the southeast corner of the land formerly belonging to Maeply; thence south thirty poles to Sherewood's line; thence west with said line east; thence east to the place of begining, containing ten, more or less, or all the estate, right, and title of the said Rufus Webb, David Webb, Abraham Shoemaker, Samu. M. Harris, and Chester Tuttle, or either of them, in and to the same; and Fredrick C. Webb did then and there bid for the said twenty feet of the

44 north or northeast end of lot No. sixty-five, in the town of Independence, in the county of Warren aforesaid, the sum of two hundred and fifty dollars; and bid the sum of forty dollars for the other lot of land so offered for sale as aforesaid; and no person bidding more, the said tracts or parcels of land, with the appertenances, was, in due form of law, openly struck off and sold to the said Fredrick C. Webb for the said several sums of two hundred and fifty dollars, and the said sum of forty dollars as aforesaid, he being the highest bidder, and that being the best prices bidden for the same. Also, at the same time and place aforesaid, I offered the rents and profits for seven years for sale of the southeast fraction of section fourteen, in township twenty-two north, of range seven west, containing $88\frac{92}{100}$ acres, and no person bidding for the same. I then offered the fee simple of said lot for sale, or all the right, title, interest, claim, and demand which the said Rufus Webb, David Webb, Abraham Shoemaker, Samuel M. Harris, and Chester Tuttle, or either of them, had in and to the said lot; and Jacob Haynes, by Fredrick C. Webb, did then and there bid fore the same the sum of three hundred and fifty dollars, and no person bidding more, the said lot of land was then, in due form, openly struck off and sold to the said Jacob Haynes for the said sum of three hundred and fifty dollars, and then and there refused to pay the money for the same, and has not paid the same, or any part thereof.

Marshal's fees:

45	Amount taxed above		$18 10
	Commission on $290 00	14 50	
	Do 300 00	15 00	
			29 50
	Advertising 3 times in the T ——— paper published at Lafayette, $3 each		9 00
	Do Journal		9 00
	Do. Terre Haute		9 00
	Return		10
	Original cost of suit		49 64
			124 34

Of the above moneys, I have retained the sum of one hundred dollars as cost on the above case, and have paid over to Fletcher & Butler, attorneys for the plaintiffs, the sum of four hundred and ninety dollars.

GAM'L TAYLOR,
Marshal of the D. of Ind'a,
Per C. J. HAND, *Deputy.*

And afterward, to wit, at a circuit court of the United States for the seventh judicial circuit and district of Indiana, begun, continued, and holden at Indianapolis, in said district, on the (6th) sixth day of December, in the year of our Lord eighteen hundred and forty-three, that being the seventeenth day of the November term of said court for the year last aforesaid.

Present, *of* honorable Elisha M. Huntington, judge of said district.

On motion of F. C. Webb, by Chandler, his att'y, the marshal is ordered to make a deed herein on the following petition, to wit:

To the honorable the judges of the United States circuit court for the seventh circuit of the United States in the State of Indiana:

46 Your petitioner would represent unto your honor that George Pomeroy, Lewis C. Wilson, Elias Butler, and William Baldwin had an execution issued by the clerk of said court on the 22 day of August, 1839, against Rufus Webb, David Webb, Abraham Shoemaker, Samuel M. Harris, and Chester Tuttle, on a judgement rendered in this court at its November term, 1838, to wit, the 21st day of November, 1838, in their favor against Rufus Webb, David Webb, and Abraham Shoemaker, for the sum of $743 73 and $34 54 cents; which judgement was on 25th day of December, 1838, replevied by Samuel M. Harris and Chester Tuttle; which execution was by Gamaliel Taylor, marshal of the district of Indiana, levied, among other land, upon the following lands, to wit: Twenty feet off the north or northeast end of lot No. sixty-five, in the town of Independence, in the county of Warren and State of Indiana; and the east half of ten acres of the northeast quarter of the west half of the northeast quarter of section twenty-two in township twenty-two north, of range

seven west, containing five acres, more or less, and being one-half of the following described premises, to wit: Beginning at the northeast corner of the land formerly belonging to Murphy, runing thence south thirty poles to Sherwood's line, thence west with said line two-thirds across said lot, thence north to said Murphy's line, thence east to the place of begining, containing ten acres, more or less. And
47 the said Gamaliel Taylor, marshal as aforesaid, did afterwards, to wit, on the 14th day of January, eighteen hundred and forty-one, between the hours of ten o'clock a. m. and 4 o'clock p. m., after giving legal notice of the time and place of said sale, first offered the rents, issues, and profits for sale for seven years of said lots and tracts of land at the door of the State-house at the town of Indianapolis, and no person bidding for the same, he then and there offered the fee simple of said lots or tracts of land for sale; and your petitioner did then and there bid the sum of two hundred and fifty dollars for the twenty feet off of the north or northeast end of lot No. sixty-five in the town of Independence aforesaid, and forty dollars for the other peice of land, and no person bidding more for said lots or tracts of land, the said lots or tracts of land, with the appurtenances, were, in due form of law, struck off and sold to your petitioner, and he hath paid the money to them for said Taylor. Your petitioner would further represent unto your honors that the said Gamaliel Taylor, marshal as aforesaid, has been removed from said office as marshal, without making a deed to your petitioner for said lands, and Robert Hanna has been appointed and is now the marshal for the district of Indiana. Your petitioner therefore prays that your honors will order and direct the said Robert Hanna, as marshal as aforesaid, to execute and deliver a deed to your petitioner. As in duty bound, will ever pray, &c.

FREDRICK C. WEBB.

48 NATHANIEL H. WEED *vs.* JACOB LUIZEE. } Assumpsit. No. 3.

The President of the United States of America to the marshal of the district of Indiana, greeting:

You are hereby commanded, of the goods and chattels, lands and tenements, of Jacob Luizee, to be found in your district, you cause to be made the sum of twenty hundred and thirty dollars and forty-two cents, which Nathaniel H. Weed lately in our said circuit court recovered against him, for his damages, which in our said court, by the judgement thereof, was adjudged to the said Nathaniel H. Weed, as also the sum of twenty-six dollars and two cents, for his costs and charges in that behalf expended, whereof the said Jacob Luizee is convict, as appears of record, and have the money before our court, at the clerk's office in Indianapolis, on the first Monday in August next. And have you then there this writ.

Witness honorable Roger B. Taney, chief justice of the Supreme Court of the United States, and the seal of said court, at [L. S.] Indianapolis, the 4th day of June, 1839.

H. BASSETT, *Clerk.*

Which execution was duly delivered to the marshal of the said district of Indiana, and by him returned, with the following endorsement thereon, to wit:

"Rec'd this writ June —. 1840.

"No goods nor chattels whereon to levy.

"Levied the same on the following described tracts and lots of land, situate in the county of Miami, in the State of Indiana, to wit: east ½ northeast quarter of section 19, town. 27 north, range 49 4, containing 80 acres. Lot 179, in the town of Peru, fractional part of lot 108, in Peru, 1,800 square feet, 30 feet front on Broadway, and east half of warehouse No. 2, in Canal street, this 22nd day of June, 1839.

"GAM'L TAYLOR,
"*U. S. Marshal for Ind. District.*
"By A. JOHNSON, *Deputy.*"

In pursuance of the within execution and above levy, I did, on the 25th day of January, 1840, in front of the State-house door, in the town of Indianapolis, in said State of Indiana, having first given three weeks' successive notice of the time and place of sale in the Peru Gazette, a paper published in the town of Peru, in the county of Miami, in said State, and also by putting up three manuscript advertisements in the township, in said county of Miami, where said lands are situated, proceed to offer for seven years the rents and profits of the said lands and lots above levied on, where no offer being made for the rents and profits, I then proceeded to dispose of and sell, and did dispose of and sell, at public auction, to Nathaniel H. Weed and his heirs, in fee simple, he being the highest and best bidder, the following described tracts at the following described prices, viz: the said east half of the northeast quarter of section nineteen, in township twenty-seven north, of range four east, containing eighty acres, at and four the sum of thirty dollars; and lot 179, in Peru, in said Miami county, at and for the sum of twenty dollars; and also front part of lot 108, in said town of Peru, being 1,800 square feet, 50 30 feet front in Broadway, and the east half of warehouse lot No. 2, on Canal street, in said town of Peru, at and for the sum of forty dollars, amounting in all to ninety dollars.

This writ returned this January 27th, 1840.

GAM'L TAYLOR,
U. S. Marshal for D. of Indiana,
Pr. A. JOHNSON, *Deputy.*

And also the following paper, to wit:

This will certify that Nathaniel H. Weed did on the twenty-fifth day of January, 1840, bid in at marshal's sale the following described

property, subject to the following mortgages, for the following prices, to wit: the E. ½ of the NE. q. of sec. 19, township 27 N., R. 4 east, containing 80 acres, mortgaged to agent (of) surplus revenue for $400, bid in for $30 00; also lot 179, in the town of Peru, Miami co., Ia., mortgaged to D. W. Gautly, of New York, for $909 82, bid in for $20,000; also fract. part of lot No. 108, in said town of Peru, being 1,800 sqr. feet, 30 feet front on Broadway; also E. ½ of warehouse lot No. 2, on Canal street, in said town of Peru, mortgaged to school-house of Miami co. for $300, bid in for $40 00, he being the highest and best bidder for the same. Said property sold at the suit of Nathaniel H. Weed against Jacob Lingee, by virtue of an execution issued from the clerk's office of the circuit court of the United States for the Indiana district, there being no bid for the rents and profits of said land and lots.

51 Given under my hand this 25th day of Jan., 1840.

GAM'L TAYLOR,
U. S. Marshal for Indiana District,
Per A. JOHNSON, *Deputy.*

And afterwards, to wit, at a circuit court of the United States for the seventh judicial circuit and district of Indiana, begun and holden at Indianapolis, in said district, on the twenty-first day of May, in the year of our Lord eighteen hundred and fifty, that being the (4th) fourth judicial day of the May term of said court for the year (1840) aforesaid, present the honorable John McLean, judge of said circuit, and the honorable John D. Holman, judge of said district, come, now, Nathaniel H. Weed, and on his application by petition, filed in these words and figures, to wit:

INDIANA DISTRICT.

Circuit court of the United States for the 7th circuit and district of Indiana, May term, 1840.

To the honorable the judges of the court aforesaid:

Your petitioner, Nathaniel H. Weed, would respectfully represent to your honors that at the May term of this honorable court for the year 1839, your petitioner recovered a judgement in this court against one Jacob Luizee for about the sum of $2,030 $\frac{4}{100}$, together with costs of suit; that on the 4th June, 1839, your petitioner regularly sued out a writ of execution upon said judgement, which was directed to the marshal of the district of Indiana, and on the day of June, 1839, the said writ of execution was delivered to and received by Gam'l Taylor, esq., then the marshal of said district; that said writ was, by the said marshal, afterwards, and before the return day hereof, to wit, on the 22d day of June, in the year 1839, duly

52 levied upon the following lands and lots, as the property of said Jacob Luizee, to wit: The east half of the northeast quarter of section nineteen, in township twenty-seven north, of range four east, containing eighty acres, situate in the county of Miami and State and district (aforesaid) of Indiana; lot numbered one hundred

and seventy-nine, in the town of Peru, in the said county of Miami and State and district aforesaid; also fractional part of lot numbered one hundred and eight in said town of Peru, in said county of Miami and State and district aforesaid, being thirty feet in front on Broadway, containing eighteen hundred square feet; which lands and lots were afterwards—that is to say, on the 25th day of January, 1840, and while the said writ of execution was so in the hands of the said marshal—duly and legally sold by said marshal at public auction, under and in pursuance of said writ of execution to your petitioner, for the price and sum of ninety dollars, which sum was then and there paid by your petitioner. All of which will more fully and at large appear by the said writ of execution, and the return thereof duly made by said marshal, and now on file in the office of the clerk of this court, to which your petitioner, for greater certainty, refers your honors.

Your petitioner would further state to your honors that since the said levy of said writ of execution the time of service of the
53 said Gamaliel Taylor, esq., as marshal of the district of Indiana, has expired, by means whereof said Taylor is incompetent to make to your petitioner a proper deed of conveyance of the premises, as sold to your petitioner, in pursuance of said sale. Your petitioner therefore prays your honors to order and direct the now marshal of the said district of Indiana to make and execute to your petitioner a deed of conveyance, in fee simple, of the premises so sold to him as aforesaid. And, as in duty bound, he will ever pray, &c.

And it appearing to the satisfaction of the court, by a writ of execution issued heretofore out of the clerk's office of this court, on the fourth day of June, 1839, and by the marshal's return thereto endorsed therein in the case of Nathaniel H. Weed against Jacob Luizee, that Gam'l Taylor, the former marshal of the district of Indiana, to whom said writ of execution was directed and delivered, as such marshal, and by virtue of said writ, legally and duly sold to said Nathaniel H. Weed, the said applicant, the lands and premises named in said petition and in said return on said writ, and that the purchase-money thereof has been duly paid upon said execution by said purchaser; and it further appearing that since said sales the tenor of service of said marshal, Gam'l Taylor, has expired, and, through inadvertance or delay, no deed of conveyance has been made by said Taylor, being such marshal as aforesaid, to said Nathaniel H.
Weed: It is therefore ordered that Jesse D. Bright, the now
54 marshal of the district of Indiana, do make and execute a deed of conveyance to said Nathaniel H. Weed, in fee simple, of all the said lands, lots, and premises so sold to him as aforesaid, as named in the said return to said writ of execution, according to the effect and tenor of said sale.

ROBERT WHITE
vs.
BENJIMAN WELLS, JASPER BRADLY, AND DAVID PATTEN. } No. 4.

The President of the United States of America to the marshal of the district of Indiana, greeting:

You are hereby commanded that of the goods and chattels, lands and tenamants, of Benjiman Wells, Jasper Bradley, and David Patten, within your district you cause to be made the sum of eleven hundred and fifty-nine $\frac{10}{100}$ dollars, being the penal amount of a bond by them given on the 22nd day of June, 1838, on replevying for the term of 180 days from May the twenty-fourth, 1836, a judg ment then rendered in the circuit court of the United States for the district of Indiana, by the consideration and judgement of the judges thereof, against the said Jasper Bradly and Benjiman Wells, in favor of Robert White, for the sum of five hundred and forty-seven dollars and twenty-eight cents, as well as the sum of 31 dollars and 22 cents for their costs and charges in this behalf laid out and expended, which term of 180 days, from said May 24th, 1838, has fully elapsed, and said bond and judgement thereby replevied remain wholly unpaid and unsatisfied, and in full force in law, whereof the said Benjiman
55 Wells, Jasper Bradly, and David Patton are convicted, as appear to us of record. Have you those moneys before the judges of said court, at their clerk's office, in the town of Indianapolis, on the first Monday, of April next, then and there to render unto the said Robert White aforesaid. And have then there this writ.

Witness honorable Roger B. Taney, chief justice of the Supreme
[L. S.] Court of the United States, and the seal of said court, at Indianapolis, the eighth day of December, 1838.

H. BASSETT, *Clerk.*

Which above execution was duly delivered to the marshal of said district, and by him returned. with the following endorsement :

By virtue of the within execution against Benjiman Wells, Jasper Bradly, and David Patton, and in favor of Robert White; and also by virtue of another execution in my hands in favor of Cunningham S. Ramsey and against William H. Davis, James Davis. David Patton, and Fredrick Davis; and also by virtue of one other execution in my hands in favor of Henry Tiffany, and against David Patton and Jasper Bradly, and all leaving the same date with the said within execution, I did, on the 6th day of February, A. D. 1841, levey the same on all the following described tracts and parcels of land, and all the estate, right, title, and interest whatsoever of the said defendant in and to the same, to wit :

The north fraction of the northwest quarter of section three,
56 in township twenty-two north, of range four west, 80 acres; the south fraction of the same quarter, 80 acres; west half of the south fraction of the northwest quarter of section two, same township and range, 40 acres; west half of southeast quarter, section

thirty-three, (33;) township twenty-three (23) north, of range four west, 80 acres ; west half of northeast quarter, section twenty-six, township twenty-two north, of range west; the southwest quarter of section twenty-three, in township twenty-two north, of range four west; the north half of the west half of the northwest quarter of section twenty-seven, township twenty-four north, of four west; northwest quarter of the southwest quarter, and the southwest quarter of the northwest quarter of section thirty-two, in township twenty-one, north, of range four west; the east half of the southwest quarter of section twenty-six, in township twenty-three north, of range five west; all lying and being situated in the county of Tippecanoe and State of Indiana; also on lots No. seventy-five and seventy-seven, in Hanna, Taylor, Stockwell, and Haiter's, to the town of Lafayette, in said county ; and also lot No. lot seventy, in Davis and Barthol-mew's addition to said town of Lafayette ; and also on lot No. eighty-six, in Cabat & Huntington's addition to said town of Lafayette; said property being by me levied on as aforesaid, by virtue of the authority aforesaid, as the property of David Patten, one of said execution defendants, to satisfy said executions.

JESSE D. BRIGHT,
U. S. M. D. Ia.,
57 Per JAMES JOHNSON,
Dep. M.

And afterwards, to wit, on the 13th day of March, A. D. 1841, after having advertised the same according to law, in the Indiana Eagle, a public newspaper of general circulation, printed and published in the town of Lafayette, in said county of Tippecanoe, for three weeks successively, and also having posted up written advertisements of the time and place of sale of said property in the most public places in each and every township wherein the said property or any part thereof is situated more than twenty days before the said 13th day of March, A. D. 1841, I did, at the door of the State-house in the town of Indianapolis and State aforesaid, expose and offer for sale to the highest bidder, at public auction and outcry, the rents and profits for the term of seven years of, in, and to all the above-described property; and failing to receive bid for the same or any part thereof, I did then and there proceed to sell, at public auction and outcry as aforesaid, the fee simple, and all the right, title, and interest of the said David Patten, or any of the other said defendants, in and to the above-described tract or parcels of land, levied upon by virtue of the said execution, and by virtue of the authority in me vested by the same. And thereupon Andrew Ingram then and there became the purchaser of the said tracts of parcels of land, and each of them, for the sum of one thousand dollars, he being the highest and best bidder, and that being the highest and best price bid for the same. And no
58 person bidding a higher or greater sum for the same, the said parcels or tracts of land above described, and all the estate, right, title, and interest of the said David Patten in and to the same were then and there by me publicly struck off and sold to the

said Andrew Ingram, at public auction and outcry as aforesaid, for the said sum of one thousand dollars; of which said sum I have applied on the within execution the sum of two hundred and forty-eight dollars and seven cents, being the amount due on the same exclusive of costs, and & paid the same over to the attorneys of the plaintiffs, as per their receipt, hereunto annexed, and also the sum of twenty (25) seven dollars and eighty nine cents, being amount of costs due on said execution, bearing a balance of seven hundred and twenty-four dollars and four cents, applied on the aforesaid execution in favor of Cuningham S. Ramsey and against the said William H. Davis, James Davis, David Patton, and Fredrick Davis.

JESSE D. BRIGHT,
U. S. M. D. of Ia.,
Per JAMES JOHNSON,
Dep'ty M.

March 15th, 1841.—Received of the marshal of the district of Indiana the sum of two hundred and forty-eight dollars and seven cents, the balance due on this execution and the judgement on which the same issued, deducting payments heretofore made, and exclusive of costs—the said sum of $248\frac{07}{100}$ being part of Andrew Ingram's bid of one thousand dollars on land sold by virtue of this execution and others.

INGRAM & BAIRD,
Att'ys for Pl'ffs.

59 And afterwards, to wit, at a circuit court of the United States for the seventh judicial circuit and district of Indiana, begun and holden at Indianapolis, in said district, on the seventeenth day of November, in the year eighteen hundred and forty-five, that being the first judicial day of the November term of said court for the year (1845) last aforesaid, present the honorable Elisha M. Huntington, judge of said district, comes the petitioner, by Simeon Yandes, his attorney, and files his petition, in the words and figures following, to wit:

To the honorable the judges of the circuit court of the United States for the 7th circuit and district of Indiana, of November term, 1845:

The petitioner of Andrew Ingram, of Lafayette, Tippecanoe county, Indiana, respectfully showeth that on the 24th day of May, 1838, one Robert White obtained judgement in this court against Benjamin Wells and Jasper Bradly for the sum of five hundred and forty-seven dollars and twenty-eight cents in damages and costs of suit, and that the said judgement was, on the 22d day of June, 1838, replevied by David Patton for the space of 180 days from said 24th day of May, 1838, by repleving bond said Wells and Bradley; all of which will fully appear by the record now remaining in this court. And also that on the 22d day of November, 1838, Cuningham S. Rausey obtained a judgement in this court against William H. Davis and James Davis for the sum of fourteen hundred and six dollars and

60 eighty-two cents in damages and costs of suit, and that the said judgement was on the 26th day of December, 1838, replevied by the said David Patton and one Fredrick Davis for the space of 180 days from said 22d day of November, 1838, by replevying bond, the said William H. Davis and James Davis being also parties obligors in said last-mentioned bond; all of which will fully appear by the record now remaining in this court.

And also that on the 20th day of May, 1839, on Henry Tiffany obtained a judgement in this court against the said David Patton for the sum of six hundred and twenty-five dollars and eighty-five cents in damages and costs of suit, and that the said judgement was on the 21st day of June, 1839, replevied by the said Jasper Bradly for the space of 180 days from the said 20th day of May, 1839, by replevying bond, the said Patton being also a party obligor in said last-mentioned bond; all of which will fully appear by the record, now remaining in this court.

That on the 8th day of December, 1840, an execution was issued out of the office of the clerk of this court upon the judgement and replevy bond first named commanding the marshal of said district to cause to be made the sume of eleven hundred and fifty-nine dollars and $\frac{1^0}{0}$, being the penal amount of said replevying bond, out of the goods and chattles, lands and tenemants of the said Benjiman Wells, Jasper Bradly, and David Patton, and the costs of suit; as will further appear, all in due forn of law, by said execution, reference being thereto had.

61 That on the said 8th day of December, 1840, an execution also issued out of the office of the clerk of this court upon the judgement and repley bond secondly above named (in favor of said Ramsey) commanding the marshal of said district to cause to be made, out of the goods and chattels, lands and tenements, of the said William H. Davis, James Davis, David Patton, and Fredrick Davis, the sum of twenty-eight hundred and seventy $\frac{48}{100}$ dollars, being the penal amount of said replevy bond secondly above mentioned; also the costs of suit; as will further appear, all in due form of law. by said execution, reference being thereto had.

That on the said 8th day of December, 1840, an execution also issued out of the office of the clerk of this court upon the judgement and replevy bond thirdly and lastly mentioned above (the one in favor of said Tiffany) commanding the marshal of said district to cause to be made, of the goods and chattels, lands and tenements, of the said David Patton and Jasper Bradly, the sum of twelve hundred and fifty-one dollars and sixty-eight cents, being the penal amount of said replevy bond thirdly above mentioned, as also the costs of suit; as will further appear, in due form of law, by said execution, reference being had thereto.

That said (three) executions were delivered by said clerk to Jesse D. Bright, the then marshal of the United States for said district of Indiana; who thereupon, to wit, on the 6th day of February, 1841, levied each and all of said three several executions upon the following-described real estate, situated and being in the county of

62 Tippecanoe and district of Indiana aforesaid, said real estate being levied upon by said Bright (as marshal as aforesaid) as the property of the said David Patten, one of the defendants in each and all of said three several executions, to satisfy said executions, that is to say: The north fraction of the northwest quarter of section number three (3) in township number twenty-two (22) north, of range number four (4) west—80 acres; the south fraction of the same northwest quarter—80 acres; the west half of the south fraction of the northwest quarter of section two (2) same township and range—40 acres; the west half of southeast quarter of section thirty-three, (33,) township twenty three (23) north, of range four (4) west—80 acres; the west half of northeast quarter of section twenty-six, (26,) township twenty-two (22) north, of range four (4) west; the southwest quarter of section twenty-three (23) in township twenty-two (22) north, of range four west; the north half of the west half of the northwest quarter of section twenty-seven, (27,) township twenty-four (24) north, of range four (4) west; the northwest quarter of the southwest quarter and the southwest quarter of the northwest quarter of section thirty-two (32) in township twenty-one (21) north, of range four (4) west; the east fraction of the southwest quarter of section twenty-six (26) in township twenty-three (23) north, of range five (5) west. Also, lots No. 75 and 77 (seventy-five and seventy-seven) in Hanna, Taylor, Stockwell, and Harter's addition to the town of Lafayette,
63 in said co. of Tippecanoe. Also, lot number seventy (70) in Davis and Bartholemew addition to said town of Lafayette. Also, lot numbered eighty-six (86) in Cabel and Huntington's addition to said town.

Your petitioner further shows that the said Bright, as marshal as aforesaid, after the said executions were levied as aforesaid upon said real estate, and after having given notice by advertisement in a public newspaper, and by putting up written advertisements in three of the most public places in the township wherein the said lands are situate, more than twenty days before the thirteenth (13th) day of March, 1841, according to law, did, on the said 13th day of March, 1841, at the door of the State house in the town of Indianapolis, in said district, within the hours prescribed by law, expose to sale at public auction and outcry the rents and profits for the term of seven years, of, in, and to the said real estate above described, and failing to receive a bid for the same, or any part thereof, the said Bright, as marshal as aforesaid, did then and there, between the hours prescribed by law as aforesaid, proceed to sell at public auction and outcry as aforesaid the fee simple of all the right, title, interest, and estate of the said David Patton, or any of said defendants, in and to the said several tracts or parcels of land levied upon as aforesaid by virtue of said execution; and that your petitioner at said sale bid off and purchased the said several tracts and parcels off real estate above described, at and for the sum of one thousand dollars for the fee simple.

64 Your petitioner further represents that said sum, so bid by him at said sale, he duly paid and satisfied to said Bright, as

marshal as aforesaid. All which will more fully and at large appear by the returns of said Bright, as marshal as aforesaid, to said executions.

Your petitioner also states that, although well entitled to a deed in fee simple for said several tracts and parcels of land so sold to him, he has not as yet received a deed for the same, on account of the failure of said Bright to make such deed. And your petitioner further states that said Bright, after the making of said sale, went out of office as marshal as aforesaid, by removal, and was succeeded in said office by Robert Hanna, who has also since gone out of office by the expiration of the term of his commission, and that his successor in said office was Abel C. Pepper, who now is the marshal of said district.

Your petitioner further prays your honor that the said Pepper, now marshal as aforesaid, may be ordered and empowered to make a deed to your petitioner for said several tracts and parcels of land above described, so by him purchased as aforesaid, in fee simple, in pursuance of such sale, &c.

ANDREW INGRAM, *Petitioner.*

And the premises being inspected, it is ordered by the court now here that Abel C. Pepper, the marshal of the district of Indiana, shall proceed without delay to execute and deliver to said Andrew Ingram a deed in fee simple for said several tracts and premises of land
65 above described, so by him purchased as aforesaid.

JOHN REEVES & WILLIAM MCLEAN
vs.
WILLIAM HUNT, ALEXANDER C. SOPER, and EDWARD WRIGHT. } No. 5.

The President of the United States of America to the marshal of the district of Indiana, greeting:

You are hereby commanded that of the goods and chattels, land and tenements of William Hunt, Alexander C. Soper, and Edward Wright, to be found in your district, you cause to be made the sum of fourteen hundred and ten dollars and cents, which John Reeves and William McLean lately in our circuit court recovered against them for their damages, which in the said court by the judgement thereof was adjudged to the said John Reeves and William McLean, and also the sum of twenty-one dollars and 74 cents for their costs and charge in that behalf expended, whereof the said William Hunt, Alanson C. Soper, and Edward Wright are convicted, as appears of record, and the money at the clerk's office of our said court at Indianapolis on the first Monday in April next, and have you then and there this writ.

Witness the honorable Roger B. Taney, chief justice of the
[L. S.] Supreme Court of the United States at Indianapolis, this 17th day of December, 1838.

H. BASSETT, *Clerk.*

Which execution was duly delivered to the marshal of the said district of Indiana, and by him returned with the following endorsement thereon:

66 Rec'd the within writ the first day of January, in the year 1839, and on the 12th day of March, 1839, there being no goods or chattels of the said defendants whereon to levy, and the defendant, Hunt, having no property whereon to levey, I levied upon, seized, and took in execution, by virtue of the within writ, as the property of the defendant Alexander C. Soper, the following described lands, lots, and premises, to wit: Lot number sixteen in the town of Black Hawk, in Shelby county and State and district of Indiana; also lot numbered thirty-one in the town of Edinburgh, in Johnson county and State and district aforesaid; and having given due and timely notice of the time and place of sale as required by law, I did, on the 18th day of January, in the year 1840, at the door of the State-house in the town of Indianapolis, in the county of Marion and State and district of Indiana, (first having then and there offered the rents and profits of said premises for the term of seven years, and having no bid therefor,) expose to sale, and then and there sell at public auction the said lots and premises above described to John Reeves, for the price and sum of eighty-one dollars, he being then and there the highest bidder, and that the highest and best price bid or offer for said lots and premises, which sum has been liquidated and settled with the said plaintiffs, as per their receipt herewith returned. And I can find no more property of the said defendants whereon to levy. January 18, 1840.

GAM'L TAYLOR.
Marshal Ind'a District.
Per C. J. HAND, *Dep'ty.*

67 And afterwards, to wit, at a circuit court of the United States for the seventh judicial circuit and district of Indiana, begun and holden at Indianapolis, in said district, on the twenty-first (21st) day of May, in the year eighteen hundred and forty, (1840,) that being the (4th) fourth judicial day of the May term of said court for the year 1840, aforesaid. Present, the Hon. John McLean, judge of said circuit, and the Jesse L. Holman, judge of said district. Now comes John Reeves, and on application by petition filed in the words following, to wit:

To the honorable the judges of the circuit court of the United States for the 7th circuit and district of Indiana, at May term, 1840:

Your petitioner, John Reeves, would respectfully represent to your honors that, at the May term, 1838, of this court, your petitioner and one William McLean recovered a judgement in this court against one William Hunt for about the sum of $\$732\frac{50}{100}$, with costs of suit, upon which judgement your petitioner and said McLean afterwards, and on or about the day of , 1838, cause of writ of execution to be issued and delivered to the marshal of the district of Indiana; whereupon, for stay of said execution for the term of six months from the

date of said judgement, as allowed by law, the said Hunt, and Alanson C. Soper and Edward Wright, his surities, executed their bond, made payable to your petitioner and said William McLean, in
68 the penalty of $1,410, conditioned for the payment of the full amount demanded by said execution, together with interest and costs accruing and to accrue thereon, at the expiration of six months from the date of said judgement, which bond was duly returned by said marshal, together with said execution and as part of his doings thereon to the office of the clerk of this court, by whom the same was thereupon duly recorded; whereby said bond became and was of the form and effect of a judgement confessed in this court.

And afterwards, on or about the 19th day of December, in the year 1838, your petitioner and the said William McLean caused a writ of execution to be issued upon the said judgement against the said William Hunt, Alanson C. Soper and Edward Wright, which last-named writ of execution was on the 1st day of January, 1839, delivered to Gamaliel Taylor, esq., then the marshal of the district of Indiana, and was by the said marshal, on the 12th day of March, 1839, duly levied upon the following lots and premises as the property of said Alanson C. Soper, to wit: Lot numbered sixteen, in the town of Black Hawk, in Shelby county and State and district of Indiana; also lot numbered thirty-one, in the town of Edinburgh, in the county of Johnson and State and district of Indiana; which lots and premises were afterwards, on the 18th day of January, 1840, duly sold by said marshal, under and by virtue of said writ of execution and levy, to your petitioner for the price and sum of $81, which sum was
69 duly paid by your petitioner; all of which will more fully appear by the said writ of execution and the return thereof duls made by said marshal, now on file in the office of the clerk of thiy court, to which your petitioner refers your honors.

Your petition further states that the said Taylor, marshal as aforesaid, has not executed to your petitioner any deed of conveyance of the said lots and premises, and that, by reason that the term of service of the said Gamaliel Taylor as marshal as aforesaid has expired, he is incompetent to execute such deed of conveyance. Your petitioner therefore prays your honors to order and direct the now marshal of the district of Indiana to make and execute such deed of conveyance, in fee, to him of said lots and premises so sold to him as aforesaid, and he will ever pray, &c.

And it appearing to the satisfaction of the court, by a writ of *of* execution issued heretofore out of the office of the clerk of this court on the 17th day of December, 1838, and by the marshal s return thereto, as endorsed thereon in the case of John Reeves and William McLean *vs.* William Hunt, that Gam'l Taylor, the former marshal of the district of Indiana, to whom said writ of execution was directed and delivered as such marshal, and by virtue of said writ, legally and duly sold to said John Reeves, the said applicant, the land and premises named in said petition and in said return to said writ, and that the purchase money thereof has been duly paid upon said exe-
70 cution by the said purchaser. And it further appearing that

since said sales the term of service of said marshal, Gam'l Taylor, has expired, and that through inadvertence or delay no deed of conveyance has been made by said Taylor, as such marshal as aforesaid, to said John Reeves, it is therefore ordered by the court that Jesse D. Bright, the now marshal of the district of Indiana, do make and execute a deed of conveyance to said John Reeves, in fee simple, of all the said lands, lots, and premises so sold to (him) *them* as aforesaid, as named in the said return of said writ of execution according to the effect and intent of said sales.

No. 6.—Be it remembered that among the records of the United States circuit court for the 7th circuit and district of Indiana, holden at Indianapolis on the eighteenth day of November, eighteen hundred and forty-five, that being the second judicial day of the November term of said court for the year 1845 aforesaid. Present, the honorable Elisha M. Huntington, judge of said district, comes the said petitioner, by Simon Yandes, esq., his attorney, and files his petition in the words and figures following, to wit:

To the honorable the judges of the circuit court of the United States for the 7th circuit and district of Indiana of November term, 1845:

The petition of Calvin Fletcher, of Marion county, Indiana, respectfully represents that on the 20th day of May, 1839, John Liter,
71 Richard Price, Joseph Price, jr., and John Cook, obtained a judgement in this court against Garret Dehaven, Gilber & Cook, Daniel G. Keedy, and Jesse Bowen, for the sum of eighteen hundred and ninety-six dollars 12 cents damages and for costs of suit, and that the said judgement was on the 19th day of June, A. D. 1839, replevied by John Bodley for the space of 180 days from said May 20th, A. D. 1839, by replevy bond, as will further appear by the record now remaining in this court. That upon the 5th day of June, A. D. 1840, an execution was issued out of the office of the clerk of this court upon said judgement and replevy bond, commanding the marshal of said district to cause to be made the sum of thirty-seven hundred and ninety-two dollars 25 cents, being the penal amount of said replevy bond, out of the goods and chattels, lands and tenements of the said defendants and said Bodly, and the costs of suit, as will further appear all in due form of law by said execution, reference being thereunto had. That said execution was delivered by said clerk to Jesse D. Bright, then marshal of the United States for said district of Indiana, who thereupon levied the same upon the following-named real estate, situate in said district of Indiana, to wit:

Ten acres, more or less, bounded as follows. beginning 7 chains 6 links west from the southwest corner of the east half northwest quarter of section 6, town 19 north, range 8 west, thence east 10 chains, thence north 10 chains, thence east 10 chains, thence south 10 chains to the place of beginning; also all the right, title, and interest of said defendants in and to a part of the west half
72 of the southeast quarter of section 36, township 20 north, of range 9 west, in the district of lands offered for sale at Craw-

fordsville, Indiana, and designated by the following metes and bounds: beginning at the northwest corner of the southeast quarter of section 36, township 20, range 9 west; thence east 20 poles to a stake on said quarter section line; thence south 3 degrees west 59 poles and 13 links to a post on the Crawfordsville road; thence north 53 degrees west 20 poles to a stake on the quarter section line; thence north 50 poles and 22 links to the place of beginning, containing six acres and 9 hundreths of an acre, be the same more or less; also all the right, title, and interest of said defendants in and to the following lots in the town of Covington, Fountain county, Indiana, viz: the south half of lot numbered 84 on the original plat of said town; also lot No. 33, lot No. 20, and lot No. 75.

Your petitioner further showes that the said Bright, as marshal as aforesaid, after the execution was levied as aforesaid upon said property, and after having given due notice by advertisement in a public newspaper, in accordance with the law in such cases made and provided, after having first offered, on the 27th day of July, 1840, between the hours prescribed by law, at the State-house door in the
town of Indianapolis, the rents and profits for 7 years of said
73 premises, and receiving no bid or offer therefor, all of which, as well as the other requisites of law, having been duly and legally performed, done and complied with by said Bright, he, as marshal as aforesaid, proceeded, on the said 27th day of July, 1840, between the hours prescribed by law, at the State-house door in the town of Indianapolis, to make sale at public outcry of said property levied upon by him by virtue of said execution. And that your petitioner at said sale bid off and purchased the said parcels of land and lots above described at and for the sum and price of, altogether, thirteen dollars for the fee simple thereof, viz: he purchased the fee simple of said parcels of land and lots at the following prices, said ten acre tract for the sum of three dollars; also said (six) $6\frac{94}{100}$ acre tract for the sum of two dollars; also the south half of lot 84 for the sum of one dollar and fifty cents; also lot No. 20 for the sum of one dollar and fifty cents, and lot No. 75 for the sum of three dollars, making in the whole the sum of thirteen dollars.

Your petitioner further states that on the 21st day of August, 1840, another execution was issued out of the clerk's office of this court upon said judgement and replevy bond, with like command to the marshal of said district as herein above named in the previous execution, and that said last execution was also delivered to said Bright, as marshal as aforesaid, who, by virtue thereof, levied the same upon the following described real estate, to wit:

All the following block of ground, beginning at a point bear-
74 ing north 11 degrees and 33 feet distance from the northeast corner of lot No. 105, in Coleman's first addition to the town of Covington, Fountain county, Indiana, so as to leave a street 33 feet wide, running from Third street to Canal street, between lot 105 and the piece of land now sold to Jesse Bowen; thence south 79 degrees west to Canal street; thence northeast with Canal street until it strikes the piece of land sold to Thomas J. Evans; thence north 79

degrees east to Third street; thence south 11 degrees west 1 chain and $\frac{75}{100}$ to the place of beginning, containing one acre and seven hundredths of an acre, be the same more or less, being a part of the northeast fractional quarter of section 35 in of north of range 9 west of the lands offered for sale at Crawfordsville, Indiana.

Your petitioner further shows that the said Bright, as marshal aforesaid, after the last-mentioned execution was levied as aforesaid upon said property last aforesaid, and after having given due notice by advertisement in a public newspaper, in accordance with the law in such cases made and provided, and after having first offered on the 21st day of November, A. D. 1840, between the hours prescribed by law, at the State-house door in the town of Indianapolis, the rents and profits for seven years of said last named premises, and receiving no bid or offer therefor, all of which, as well as the other requisites of law having been duly and legally performed, done, and complied with by said Bright, he, as marshal aforesaid, proceeded on
75 said 21st day of November, A. D. 1840, between the hours prescribed by law, at the State-house door in the town, to make sale, at public outcry, of said property so levied upon by him by virtue of said last-mentioned execution; and that your petitioner at said last-mentioned sale bid off and purchased the fee simple of said last-mentioned tract of land at and for the sum and price of seventy-five dollars. Your petitioner further states that said sums so bid by him at said sales were, at the date thereof, paid and ratified to said Bright, as marshal as aforesaid, and which said sale will more fully and at large appear by the returns of said Bright, as marshal as aforesaid, to said executions.

Your petitioner also states that, although well entitled to a deed in fee simple for said premise so sold to him, he has not received a deed for the same or any part thereof, on account of the failure of said Bright to make such deed; and your petitioner also states that when said Bright went out of office as marshal as aforesaid, (which was by his removal,) he was succeeded in said office by Robert Hanna, who has also since gone out of office by the expiration of the term of his commission, and that his successor in said office was Abel C. Pepper, who now is the marshal of said district.

Your petitioner, therefore, prays your honors that the said Pepper, now marshal as aforesaid, may be ordered and empowered to make a deed to your petitioner for said lands and lots by him bought, in fee simple, in pursuance to said sale. And he will ever pray, &c.

CALVIN FLETCHER.

N. B.—The execution in this case on which the sale was
76 made has been mislaid, and is not to be found in the office.

H. BASSETT, *Clerk.*

And the premises being inspected, it is ordered by the court now here that Abel C. Pepper, the marshal of the district of Indiana, shall proceed without delay to execute and deliver to said Calvin Fletcher a deed, in fee simple, for the lots and parcels of land sold and bought as aforesaid.

UNITED STATES OF AMERICA.

Circuit court of the United States, district and circuit of Indiana:

I, Horace Bassett, clerk of the United States circuit court for the seventh judicial circuit and district of Indiana, do hereby certify that the foregoing transcript, numbered from No. 1 to No. 6, inclusive, are true and correct copies from the records now in my office.

Witness my hand and the seal of said court, hereunto affixed, at Indianapolis this (9th) ninth day of August, in the year of our Lord eighteen hundred and fifty-eight.

[L. S.]

HORACE BASSETT, *Clerk.*

Agreement, to wit:

It is agreed that the foregoing copy and No. 1 of the series shall, to all purposes, be received in evidence with the same effect as if it was incorporated in the transcript of the case in which the proceedings No. 1 were had as if the original record was presented; that the other proceedings embraced in this series shall be received as evidence or not, and to the same effect as if the original record of the same and the cases in which they were had was presented.

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Z. BAIRD,
H. W. CHASE,
For Def'ts.
R. JONES, *For pl'ff.*

To the reading of which and each part thereof the defendant objected as irrelevant, and excepted to the overruling of such objection. The plaintiff offered and read in evidence the following: C. to C.

And thereupon the said plaintiff offered and read in evidence memorandum of judgement rendered in the Tippecanoe circuit court, and of the date of the rendition of each judgement and amount thereof, which memorandum was so read in evidence, under an agreement between the parties, that the judgements therein described were rendered in said court, so that the said memorandum thereof should have the same effect as evidence to the same extent and for the same purposes as certified transcripts of said judgement, if offered and read in evidence by said plaintiffs, would have had, which said memorandum of said judgements read as follows, to wit: Horatio I. Harris *vs.* David Webb and Abraham Shoemaker, judg't ren'd April 9, 1838, for $594 07; Ralph Clark, Sidney Smith, and Enos P. Clark *vs.* David Webb and Abraham Shoemaker and Rufus Webb, (Samuel M. Harris then replevy bail,) judgement ren'd April 9, 1838, for $259 12; Horatio I. Harris *vs.* David Webb, Abraham Shoemaker, and Rufus Webb, (Samuel M. Harris then replevy bail,) judgement April 9, 1838, for $1,066 28; James White *vs.* David Webb and Abraham Shoemaker, judgement April 9, 1838, for $316 25; John Taylor *vs.* David Webb and Abraham Shoemaker, judg. ren'd April 9, 1838, for $1,105 50; John Pettit, adm'r of James M. Jarrett, deceased, *vs.* David Webb and Abraham Shoemaker, judg. ren'd April 18, 1838, for 567 17; Warren Kimble *vs.* David Webb and

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Abraham Shoemaker, judg't ren'd Nov. 6, 1838, for $800 37; John McCormick *vs.* David Webb and Abraham Shoemaker, judg't ren'd Nov. 6, 1838, for $188 81; Peter M. Suydam, John R. Suydam, and Stiles P. York *vs.* David Webb and Abraham Shoemaker, judg. ren'd Nov. 6, 1838, for $323 51; Levi Cook and Charles Ames *vs.* David Webb and Abraham Shoemaker, judg. ren'd Nov. 6, 1838, for $104 45; James Wiley *vs.* David Webb and Abraham Shoemaker, judg. ren'd Nov. 6, 1838, for $252 39; Gideon Frost and John M. Mauer *vs.* David Webb and Abraham Shoemaker, judg. ren'd April 13, 1838, $645 80; Joseph B. Varnum, Dudley B. Fuller, and John H. Graham *vs.* David Webb and Abraham Shoemaker, judg't ren'd April 13, 1838, for $1,037 30; Joseph B. Varnum, Dudley B. Fuller, John H. Graham *vs.* David Webb and Abraham Shoemaker, judg't ren'd April 13, 1838, for $972 75; Aron B. Fountain *vs.* David Webb and Abraham Shoemaker, judg. ren'd Nov. 6, 1838, for 428 93; John Curtis
79 and Henry W. Ellsworth *vs.* David Webb and Abraham Shoemaker, judg. ren'd Nov. 7, 1838, for $658 76; John Stevens *vs.* David Webb and Abraham Shoemaker, judg. ren'd Nov. 7, 1838, for $284 80; Richard Lee and Clement Remington *vs.* David Webb and Abraham Shoemaker, judg. ren'd Nov. 7, 1838, $271 72; Thomas M. Smith and Abraham Shea *vs.* David Webb and Abraham Shoemaker, judg. ren'd Nov. 7, 1838, for $452 43: Abraham Tappan, Lewis Tappan, Alfred Edwards, and William E. Whitney *vs.* David Webb and Abraham Shoemaker, judg't ren'd Nov. 7, 1838, for $408 92; and thereupon the said plaintiffs offered and read in evidence the following transcript, from the office of the recorder of said county of Tippecanoe, which were duly authenticated, of two mortgages, which read as follows:

This indenture, made this fifth day of April, A. D. eighteen hundred and thirty-eight, between David Webb, of the county of Tippecanoe, in the State of Indiana, of the first part, and James Davis, Thomas B. Brown, Samuel Hoover, Stephen Taylor, Isaac V. Harter, and David Jennings, of the same county of Tippecanoe and State of Indiana, as aforesaid, of the second part, witnesseth, that whereas the said parties of the second part are the securities, and are *the* responsible and liable for many debts and responsibilities for the said party of the first part for a portion of the surplus revenue loaned to him, the said party of the first part, by William M. Jemers, esq., the
80 legally authorized agent of the said county, and as endorsed upon notes in the Branch Bank of the State of Indiana, at Lafayette, in the said county of Tippecanoe, and, as the replevy bail upon several judgements obtained against the said David Webb, at the October term of the Tippecanoe circuit court, in the year eighteen hundred and thirty-seven, the said David Webb being of the firm of Webb & Shoemaker, who transacted business under the title and by that name, the said Shoemaker being Abraham Shoemaker, now, therefore, in consideration of the premises, and for the better securing of the said Davis, Brown, Hoover, Taylor, Harter, and Jennings, the said party of the second part, and also in consideration of one dollar to him paid in hand, the receipt whereof is hereby ac-

knowledged, the party of the first part does hereby grant, bargain, sell, and convey unto the said party of the second part, and their heirs and assigns forever, all those certain tracts or parcels of land situate and lying in the county of Tippecanoe and State of Indiana, and described as follows, to wit: Lots numbered eighty-nine, (89,) ninety-one, (91,) and ninety-five, (95,) on the original plat of the town of Lafayette, in the said county of Tippecanoe, in the said State of Indiana, and also lot numbered ninety (90) on the same plat of said town; also lots numbered fifty-four, (54,) sixty-six, (66,) and seventy-one, (71,) in the town of Americus, in the said county of Tippe-
81 canoe, together with all the hereditaments and appertenances thereunto belonging or in anywise appertaining, and all the estate, right, title, and interest whatsoever, as well equitable as legal, of the said party of the first part, of, in, and to the above-described premises, to have and to hold the said premises, with all and singular their said appurtenances, to the said party of the second part and their heirs and assigns forever. And the said David Webb does for himself, his heirs, executors, and administrators, covenant and agree to and with the said Davis, Brown, Hoover, Taylor, Harter, and Jennings, and their executors, administrators, and assigns, that he, the said party of the first part, is lawfully seized in fee of the said premises, that he is the true and lawful owner of the said premises, and has good right, full power, and lawful authority to sell and convey the same in manner and form aforesaid, and that the said premises are free from all encumbrances; and, further, that he, the said party of the first part, for himself, and his heirs, executors, and administrators, will forever warrant and defend the said premises, with their said appurtenances and every part thereof unto the said party of the second part, their heirs and assign forever, against all lawful claims and demands of any and all persons whatsoever according to the true intent and meaning of this indenture: Provided, however, and it is hereby expressly agreed and declared by and between the said parties, that if the said party of the first shall pay and fully satisfy and discharge all the debts, dues, and liabilities for which the said
82 parties of second part are in any way responsible on his account, and save them harmless and free from the payment of any money whatever or any liability of the said party of the first part, and that they be put to cost whatever, then this indenture and all the estate, right, title, and interest thereby granted shall cease and be wholly void, but otherwise the same shall be and forever remain valid and absolute to all intents and purposes whatever.

In testimony whereof, the said David Webb has hereunto set his hand and seal the day and year first above written.

DAVID WEBB. [SEAL.]

Signed, sealed, and delivered in the presence of—

DEEMER BARD.

STATE OF INDIANA, *Tippecanoe county, set:*

Before me, Dumer Bard, a justice of the peace within and for the said county, personally came David Webb, the grantor named in the

above deed of conveyance, and, being by me examined concerning the same, acknowledged it to be his voluntary act and deed for the purposes therein contained.

In witness whereof I have hereunto set my hand and seal this fifth day of April, A. D. 1838.

DUMER BARD, *J. P.* [SEAL.]

A true record, recorded May 28, 1838.

SANDFORD C. COX, *Recorder.*

STATE OF INDIANA, *Tippecanoe county, sct:*

I, Sanford C. Cox, recorder within and for said county, do
83 hereby certify the within and foregoing is a true, full, and perfect copy and transcript of the record of the original as the same appears of record in Book L, pages 111 and 112, of the records here in my office.

In testimony whereof I have hereunto set my hand and seal, being my ink scrawl, no other being provided, this 22d day of January, 1850.

SANDFORD C. COX,
Recorder. [SEAL.]

This indenture, made this fifth day of April, A. D. eighteen hundred and thirty-eight, between David Webb and Abraham Shoemaker, of the county of Tippecanoe, in the State of Indiana, of the first part, and James Davis, Thomas B. Brown, Samuel Hoover, Stephen Taylor, Isaac V. Harter, and David Jennings, of the second part, witnesseth, that whereas the said parties of the second part are the surities, and are responsible and liable for many debts and demands of the said parties of the first part, particularly as the replevy bail upon *diverre* judgements in the Tippecanoe county court, rendered at its October term in the year 1837, and for a portion of the surplus revenue loaned to said Webb by William M. James, as the agent of the said county of Tippecanoe, and as endorsed upon notes in the Branch Bank of the State of Indiana, at Lafayette, the said parties of the first part having been merchants, traders, and partners in business, under the firm and by the name and style of Webb and Shoemaker, now therefore, in consideration of the premises, and for the better securing of the said Brown, Davis, Hoover, Taylor, Harter, and Jennings, the said
84 parties of the second part, and also in consideration of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, the said party of the first part do hereby grant, bargain, sell, and convey unto the said parties of the second part, their heirs and assigns forever, all those certain tract or parcels of land situate and lying in the county of Tippecanoe and State of Indiana, and described as follows, to wit: Lots numbered five, (5,) thirty-eight, (38,) fifty-nine, 59,) and sixty-five, (65,) in the town plat of Americus, as laid out by Wm. Digby; also lot ninety-four, (94,) on the original town plat of Lafayette; also the west half of the northwest quarter of section thirty-two, in township twenty-three north, of range four west; also the west half of the southwest quarter of section thirty-two, (32,) in township twenty-three (23) north, of range four west; also one equal fifth

part of the lot of land numbered ten, (10,) in the school section in township twenty-three north, of range four west; also the east half of the northeast quarter of section ten, in township twenty-one north, of range ten west, situate in the county of Boon, in said State of Indiana; also lots numbered one hundred and five, (105,) and seventy-nine, (79,) and ninety-six, (96,) and eighty-two, (82.) in the town of Americus, in the said county of Tippecanoe, in the said State of Indiana, together with all the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and all the estate, right, title, and interest whatsoever, as well equitable as legal, of the said party of the first part, of, in, and to the above-described premises. To have and to hold the said premises, with all and singular their said appurtenances to the said party of the second part, their heirs
85 and assigns forever. And the said David Webb and Abraham Shoemaker do for themselves, their heirs, executors, administrators, covenant and agree to and with the said parties of the second part, and with their heirs, executors, administrators, and assigns, that they, the said party of the first part, are lawfully seized in fee of the said premises; that they are true and lawful owners of the said premises, and have good right, full power, and lawful authority to sell and convey the same in manner and form aforesaid, and that the said premises are free from all encumbrances. And further, that they, the said party of the first part, for themselves, their heirs, executors, and administrators, will forever warrant and defend the said premises, with their appurtenances and every part thereof, unto the said party of the second part, their heirs and assigns forever, against all lawful claims and demands of any and all persons whatsoever, according to the true intent and meaning of this indenture: Provided, however, and it is hereby expressly agreed and declared by and between the said parties, that if the said parties of the first part shall pay and fully discharge all the debts, dues, and liabilities for which the said parties of the second part are any way or manner responsible, and save them harmless and free from the payment of any money whatever at any time on account of the said parties of the first part,
86 and be put to no costs whatever, then this indenture, and all the estate, right, title, and interest thereby granted, shall be and forever remain valid and absolute to all intents and purposes whatever.

In testimony whereof the said David Webb and Abraham Shoemaker have hereunto set their hands and seals, the day and year first above written.

DAVID WEBB. [SEAL.]
ABRAHAM SHOEMAKER. [SEAL.]

Signed, sealed, and delivered in the presence of—
DUMER BARD.

STATE OF INDIANA,
Tippecanoe county, ss:

Before me, Dumer Bard, a justice of the peace within and for said county, personally came David Webb and Abraham Shoemaker, the

grantors named in the above deed of conveyance, and being by me examined concerning the same, acknowledged it to be their voluntary act and deed for the purposes therein mentioned.

In witness whereof I have hereunto set my hand and seal this fifth day of April, A. D. 1838.

DUMER BARD, *J. P.* [SEAL.]

A true record, recorded May 28th, A. D. 1838.

SANFORD C. COX,
Recorder.

STATE OF INDIANA, *Tippecanoe county, ss:*

I, Sanford C. Cox, recorder within and for said county, do hereby certify that the foregoing is a full, true, and perfect copy and transcript of the record of the original, as the same appears of record in Book S, pages 109, 110, and 111 of the records here in my office.

In testimony whereof I have hereunto set my hand and seal
87 (being my ink scrawl, no other seal having been provided) this 22d day of January, A. D. 1850.

SANFORD C. COX, *Recorder.* [SEAL.]

And also proved that in the Tippecanoe court of common pleas, at the April term thereof, 1851, in a certain suit therein pending in said court, in which James Davis, one of the mortgagees named in said mortgage, was complainant, and the other mortgagees the heirs-at-law of said David Webb and the said Shoemaker, the State Bank of Indiana and the defendants in this suit were defendants, a decree of foreclosure of said mortgages was rendered, and for the sale of the said mortgaged premises, for the payment and satisfaction of the sum of two thousand three hundred and sixty-five dollars, which the court then and there decreed to be due and owing to the said Davis, and a lien on said mortgaged premises. It was admitted, for the purpose of this trial, that said decree was in all respects regular, and the above statement thereof is, by agreement of the parties in this bill of exceptions, substituted for the complete record thereof, under an agreement that said statement shall have the same force and effect, and be regarded by the Supreme Court, in every respect and for every purpose, as the complete record of said decree would *be* were it here copied. The defendant then offered in evidence the trust-deed, which follows hereinafter; to the admission of which the plaintiff at the time objected, because said deed is *void on its face*, as a conveyance made with a view to hinder and delay creditors; which objection the court overruled, holding said deed valid on its
88 face and operative, unless it could be impeached by proof of extrinsic facts, and allowed to be read in evidence, to which ruling of the court the plaintiff then and there excepted, which deed reads as follows:

From D to D—from transcript X.

This indenture, made this fifth day of November, eighteen hundred and thirty-eight, between David Webb and Abraham Shoemaker,

of the county of Tippecanoe, in the State of Indiana, of the first part, and William M. Jenners, of the same place, of the second part, witnesseth: That whereas the said David Webb and Abraham Shoemaker are largely indebted to sundry persons; and whereas it is believed that their property would fall far short of satisfying those debts if collections were sought to be enforced by the summary and usual process of law; and whereas there are now heavy liens resting upon their estate, the younger class of which, by due course of law, would most likely be defeated by the older liens absorbing the estate; and whereas David Jennings and Stephen Taylor have become replevin bail for said Webb and Shoemaker upon a heavy amount of judgments rendered against them in the circuit court of said county of Tippecanoe, at the October term thereof, for the year eighteen hundred and thirty-seven, which judgments are yet mostly outstanding and unpaid; and whereas, to effect payment of the judg-
89 ments last aforesaid, and some older and other liens resting upon the lands of said Webb and Shoemaker, the said David Jennings and Stephen Taylor have placed for discount in branch, at Lafayette, of the State Bank of Indiana, their negotiable promisary note for nine thousand dollars, with Mathew H. Winton, James Davis, David Runnion, Lamar Pharis, and Loyal Fairman, their endorser thereon, the proceeds of which note, so to be discounted for them by the said branch bank, are to be applied to the payment of the said last-mentioned judgements and some other liens against said Webb and Shoemaker, and which said note is expected to be renewed from time to time to said branch bank after the payment of proper curtailments by the same or other drawers in whole or in part, and with the same or other endorsers in whole or in part; and whereas an advantage would arise to the creditors of said Webb and Shoemaker by placing in the hands of a trustee for disposition as well the property of said parties subject to execution as choses in action not subject to execution, thereby enlarging the land subject at law to the payment of those debts, and avoiding the sacrifice of a sheriff's sale, as well as a mutual advantage to said Webb and Shoemaker from the prospect of realizing a greater sum of money for their property, and discharging a greater portion, as they hope all, of their debts: Now, therefore, the said parties of the first part, in consideration of the premises, and of one dollar to them in hand paid by the
90 said party of second part, the receipt whereof they do hereby acknowledge, do hereby grant, bargain, sell, convey, transfer, and assign unto the said William M. Jenners, and to his executors, administrator or administrators, lawfully to be appointed and qualified as such, all and singular the real estate, goods, chattels, judgements, notes, securities for money, open accounts, and other choses in action, bank stock, and insurance stock, hereinafter named and described in the schedule hereinbelow made, hereby declaring and appointing such executor or executors, administrator or administrators, lawfully to be appointed and qualified as such successors to the said William M. Jenners in the trust hereinafter declared created. To have and to hold unto the said William M. Jenners during his natural life,

and to his successor or successors, as aforesaid, after his death, all and singular the real estate, goods, chattels, judgements, notes, securities for money, open accounts. and other choses in action, bank stock, and insurance stock, before mentioned, untill the objects of the trust hereby declared shall have been performed and ended; and it is hereby expressly declared and provided that the grant, bargain, sale, conveyance, transfer, and assignment hereby made is to be subject to the following trusts, and accompanied with the following powers, that is to say, the said trustee and his successors may, from time to time, by proper and apt
91 instruments in writing, or other contracts, bargain, sell, convey, transfer, assign, and dispose of all and singular the property and things hereby conveyed to him as such trustee, to any person or persons, for money, or other valuable article, to be afterwards by him converted into money, or for securities for money, upon such time and terms as he shall think most conducive to the interest hereby intended to be promoted; provided, however, that he shall not make sale of any part of the real estate hereby conveyed within the period of eighteen months from this date, unless a fair price can within that time be obtained therefor, and at any time when he shall make sale of any part of said real estate he shall not in such contract of sale allow a longer credit than five years upon any part of the purchase money. He shall have power to rent, lease, and hire the said real estate from time to time, but no leasehold term to exceed three years; he may allow the said parties of the first part to continue in his name and for his own use as such trustee in the distillery business, on that part of the premises now used for that purpose, and allow them to enjoy such possession of said premises and personal property as may be necessary and convenient for conducting such business, and the business of fatting hogs, or the like, which usually is connected with distilling, allowing them such reasonable compensation for their services as may be necessary for their complete sustenance, but
92 having at all times the control and ownership as such trustee of said business, and the property employed therein, with the right to take immediate possession thereof at any time when he shall think proper to do so; he may receive dividends on said bank and insurance stock; may collect by suit, or proper legal process, or otherwise, all monies due, or to grow due, or already paid into the justices of the peace, or other officers in whose hands they now are, upon any of the securities for money or demand hereby transferred to him, and generally he may sue and dispose of all the property and things hereby conveyed to him in such way as he shall think most likely to realize the greatest avails of money therefrom, and in all cases shall have power to execute in the course of his business, as such trustee, all proper and necessary releases, receipts, acquittances, satisfactions, or other instruments in writing necessary in said duties of trustee. And it is hereby witnessed, agreed, and declared that the said parties of the first part have, at the date of these presents, put the said trustee in full possession of all the property, estate, and

things hereby conveyed in trust, and that this deed is on their part irrevocable.

And it is further hereby declared, expressed, and provided that the moneys arising and accruing from time to time from said
93 trust fund are to be applied by said trustee and his successors to the following usages, and in the following order, to wit: The commissions allowed to the trustee, and the necessary expenses of executing the said trust, are first in all cases to be paid; next the said debt due to said branch bank upon the said negotiable note of nine thousand dollars is to be paid, whether that payment becomes necessary to be made directly upon said note, by way of curtailment, or upon any other note or notes hereafter to be executed from time to time, and discounted by said bank for the renewal of said last mentioned debt, or any part thereof, whether such note shall be drawn by the same or other drawer, in whole or in part, as those whose names are now upon nine thousand dollars, it being the intent and meaning of these presents that next to the commissioners of said trustee, and the other expenses of executing said trust, the said bank of nine thousand dollars shall be paid, whether the same continue to be endorsed by the said nine thousand-dollar note, or whether new notes as aforesaid shall be discounted for the payment of any part thereof, until such notes shall be fully paid and satisfied; and if it shall so happen that the above-named endorsers, or any future endorser, or any such required note, shall be compelled to pay to said branch bank the sum, or any part thereof, then the said trustee shall pay and refund to them such amount so paid out by them in the same order as above directed to pay said branch bank. Next, after the payment of said bank debt now of nine thousand dollars, the said trustee shall pay out of the trust fund aforesaid the judgement rendered against the said Webb & Shoemaker, or either of them, or as co-defendants with any other person or persons, or as sur-
94 vivors of any other co-contractor in the said Tippecane circuit court, at the April term thereof, for the year eighteen hundred and thirty-eight, paying first the judgements which are the oldest liens upon the real estate of said Webb & Shoemaker, and so on in their order in which the liens are of the same age, then as to them rateably, according to their amounts. And after payment of said judgements of April term, 1838, aforesaid, which are now liens upon the real estate aforesaid, Webb & Shoemaker, the said trustee is next to pay out of the trust fund aforesaid all other and future judgements against the said Webb & Shoemaker in the order in which they become liens upon their real estate, and rateably according to their amount when liens are of the same age; and after the payment of all such liens as aforesaid, which have or may hereafter accrue against the real estate of said Webb & Shoemaker, the said trustee is next to pay out of the trust fund aforesaid ratiably, according to their amount, all other debts due and owing, and to become before such time due, of the said Webb & Shoemaker, which may at the time or times of such payment be made known to, and the securities therefor, or evidence thereof, deposited with said trustee until all such debts and

liabilities of said Webb & Shoemaker shall be fully paid and satisfied, when the said trust shall cease and be determined, and the residue of the trust fund then on hand shall revert to the grantors herein,
95 and be surrendered by said trustee to them; it being, however, the intent of these presents that one thousand dollars of the debt now owing by said Webb & Shoemaker to said branch bank, and the debts due from them, or either of them, to the State of Indiana for money loaned to pay the second and third instalments on their bank stock, and for money loaned out of the sinking fund, shall not be paid by said trustee out of said trustee fund until the creditors of said Webb & Shoemaker are first paid, inasmuch as said bank debt is a lien on their bank stock, and said other debts are secured by mortgage on their lands, and have considerable time yet to run; but the said trustee may at any time pay the accruing interest upon said last-named mortgaged debts, or make any payments upon said debts when in his opinion it becomes necessary so to do, to prevent a forfeiture of the mortaged premises.

It is further hereby declared, expressed, and stipulated that the said trustee shall be allowed for his successors, in executing said trust, five per cent. on all disbursements made by him to the creditors of said Webb & Shoemaker out of the avails arrising from their personal estate, hereby conveyed to him in trust, and two and a half per cent. in all disbursements made by him as aforesaid out of the proceeds of the real estate hereby conveyed in trust, to be retained by him
96 at the respective times of making such disbursements; and he is hereby required, from time to time, as fast as monies are realized by him out of said trust from, to pay the same over, without unnecessary delay, as above directed.

It is further hereby declared and expressed that the following is a schedule and description of the real estate, goods and chattels, judgements, notes, securities for money, open accounts and other choses in action, bank stock and insurance stock hereby conveyed and transfered in trust to said William M. Jenners and his successors, and that all the right, title, and interest of the said parties of the first part, and of each or either of them, is hereby conveyed and assigned to him and his successors in trust as aforesaid, to wit: The following-described tracts and parcels of land, situate in said county of Tippecanoe—that is to say: The west half of the northwest quarter of section thirty-two in township twenty-three north, of range four west; also the west half of the southwest quarter of the same section; also one equal fifth part of lot number ten in the school section in township number twenty-three north, of range four west; also lots numbered ninty-nine, ninety-one, ninety-four, ninety-five, and eighty-nine in the original plat of the town of Lafayette; also lots numbered five, thirty-eight, fifty-nine, sixty-five, fifty-four, sixty-six, and seventy-one in the plat of
97 the town of Americus, laid out by William Digley; also lots one hundred and five, seventy-nine, ninety-six, and eighty-two in said town of Americus; also all the right, title, and interest of the said Webb & Shoemaker, as mortgagees ortherwise, of and in a certain lot of land in the county of Boone, in said State, described in the mort-

gage of Ann Mead to them as the east half of the northeast quarter of section ten, in township twenty-one north, of range ten: together with the appurtenances thereunto belonging. Also, the following notes belonging to us, and whether payable to us or not, and drawn by the following persons, to wit: B. F. Chamberlin, 2 notes, $85 21; Edward Smith, $34 45; R. Powell, $60; John C. Norman, 20 54; John Carrall, 2 notes, $28 12; John Carlman, $45; James Chapman, 3 notes, $215 43; Andrew Newman, $77 52; R. & M. English, $53 33; John Small, 31 27; Do., $10 25; Stephen Taylor, $26; Do., $179 92; Do. to R. Bunnell, assigned, bal., 25; David Jennings, $50; Do., $26 15; R. Blackledge, $6; Isaac Hollowell, $4; S. W. Remudy, 13 49; F. C. Webb, 47 46; Do., 46 22; M. S. Pierce, 57 41; Pierce & Eaff, bal., 21 06; John Chiner, 4 39; Sewall Clearer, 33 05; Noah Grigg, $4 90; Thos. Hamar, $5; Thomas Howard, $9 52; Samuel Romebal, $10 69; W. M. James, 21 88; Sewell Cleaser, $30; Daniel Huchinson, 12 16; R. & B. R. Martin, $121 15; Arch'd Scott, $55 69; James Davis, 130 46; Rufus Webb & Co., $1,861 95; Elias Bedford, $2,482 34; John Martin, 1 82; David South, 56 17; Do., $4 75; George Ressler, 2 63;
98 John S. Davis, $1 48; Martin Lane, 18 48; Garrett Eaff, $115 21; John Roberts, esq., rec't as J. P., $12 00; John Culmore, $11; Robert Anderson, (stage-driver,) $24 98; Aron Fink, $16 12; Do., $13; M. L. Hinton, esq., rec't as J. P., $19 25; John Davis, esq., 3 notes as J. P., $55 93; Thos. Starks, of Wisconsin, rec't do. J. P., and he says are received, $176 07; Charles Cleaver, $15 82; Hiram Wells, $5; Ward Eaff, $9 94; J. M. Eoff, $30 13; Wm. Anderson, $8 81; Aron Mead, $80 00; Hugh W. Strain, $3 60; Allen M. Pruitt, $16 96; John Anderson, $12 40; David Pugh, $19 25; Murdicai Ellis, $31 38; Samuel Rogers, $25 94; John Flood, $5 26; Jefferson Reid, $11; John Merrill, 3 12; John Tolin, 24 24; Jacob Thorten, 7 94; Thomas Chubb, 66 00; J. W. Carey, $17 18; David S. Carey, 18 01; Jacob Davidson, 18 44; John & Th. Concaunus, $4; Freeman Fishback, $24 73; Isaac L. Lathrop, $54 79; George Martin, 11 88; John Marshall, 32 69; Sam'l Harryman, $92 00; Wm. Hosier, 9 04; Holldey Jones, 3 notes, 188 04; John M. Jones, 3 notes, 94 98; David Graham, 16 06; Joseph Burt, 2 notes, $120 91; Elias Freel, 2 notes, 56 14; Geo. Baer, $15; Jesse Brant, $7 50; Clement McCroy, $8 75; Jas. B. Tindall, 34 64; Ruben Griswold, $37 81; Nathan Busick, 44 97; Jesse Davis, $7 28; Aaron Mead, 49 70; Alfered Boyles, $19; Joseph Burt, 52 40. Also, the following judgements, and against the following persons, to wit: On the docket of C. Marvin, esq: David Whitrell, repl., $3 61; Isaac Concaurun, ci. fa. in let. b't against
99 Beckner 17 19; James Burt, repl., 77 23; John Rogers, (repl.,) 51 16; Do., repl., 12 22; Lewis Hoagland, repl., 77 79; Shanks and Whitcomb, repl., 13 51; Henry Gates, 55 19; David Galbreth (done attach) bal., 27 75; David Hamilton, repl., $67; John Collins, 4 69; Geo. W. Knight, jr., repl., 20 90; Wm. Porter, repl., 25 62; Wm. James, repl., 25 48. Docket of D. Bard, esq.: Jona. Wolf, 14 98; Benj. M. Gaham, repl., $7 75; Do., (repl.,) $20; John S. Frogg, (repl.,) 20 22; H. T. Sample, $53 38; Sample & Bogs, 68 87; Jas. Wolf, 5 77; Jas. Knapper, repl., $44 01; Elam Breese, (repl.,) 22 50; James Durey,

repl., 52 02; John Cicle, repl., $99 98; Geo. Taylor, 22 22; Geo. Tanner, 11 62; Jas. Youst, 1 51. Docket of C. Marion, esq.: Jonathan Kellers, (bal.,) 51 58; Do. 11 38; J. N. Cerey, 78 74; Allen M. Pruit, 34 35; Hartwell Wilson, 6 23; Ichabod Lathrop, 35 49; Thomas Stone, 32 13; Sam'l Gay, 2 13; Wm. Hill, 10 80; John G. Tulles, 46 04; John Campbell, 16 79; Isaac Dones, 79 81; Mathew George, 11 90; Henry Ward, 26 26; Isaac Concammon, 11 37; Elias Turner, 41 90; John Bransteller, 21 89; Jos. Gummen, 11 56; Sarah Crawford, $11; Wm. Gearon, 13 56; C. W. Franklin, $14 06; D. S. Baker, $7 25; Wm. D. Young, 9 64; David Careren, 11 93.

On the docket of F. C. Webb, esq.: judgements against sundry persons to the amount of $2 00, more or less.

On the docket of A. B. Slaughter, esq.: judgements against sundry persons to the amount of $25, more or less.

100 Also all other judgements in our favor yet outstanding upon the docket of either of the above-named magistrates. Also the following book accounts, and upon the following persons, to wit: Estate of David Taylor, dec., 101 87; Wm. Cole, 1 25; John S. Piper, $2 15; Jona. Tanner, $3; Abel Layton, 10 63; Elias Bedford, $100; Walter Freeman, 10 63; Mary Neuman, 5 51; James Davis, 109 59; Thos. Jones, $2; John South, $15 06; Stephen Taylor, 83 56; Sam'l Howard, 9 53; Henry Oiler, $1; Mrs. Man, 4 59; John H. Strain, $5; John Allen, supposed, $400; W. M. Hendricks, jr., $9 26; L. H. Burnett, 39 99; Aaron Claipell, 3 70; Wm. Thompson, $2 50; James Chapman, 24 68; Wm. Moore, 6 75; Chausing Webster, $31; Thos. Howard, $1 75; Hugh O. Neal, 12 75; Isaac Lupton, 2 25; Isaac Lathrop, 4 15: Abraham Morman, 5 88; John C. Morman, 5 63; Elias Jones, 2 63; Isaac V. Harter, 23 85; Wm. Lane, near Delphi, 11 64; James Regan, 2 19; estate of J. F. Jack, de'd, $12 00; estate of J. M. Janett, de'd, 460 13; J. V. Harter, (cash lent,) $60; Jas. G. Capp, for whiskey, $2 50; John Egleston, $45 54; Joseph Kirkpatrick, 30 86; James Baird, 7 75; estate of John Corau, $12 38; N. D. Hilton, $3 79; Sol. Laton, 17 61; Wm. Ashley, $9 50; Isaac Davis, 9 19; Jane Cole, $6; Wm. Garoy, 19 30; A. S. Hendricks, 11 70; Alexander McKinney, $5; Ezekial Tumnier, $6; est. of Nath. White, 51 31; Allen M. Pruit, 14 02; David Caney, 4 27; Nancey Long, 38 65; Abm. Bonton, 2 09; Benj. Lanham, $23 57; Dan'l H. McCafferty, 6 63; Hiram Wells,

101 $10 73; James Cox, $2 07; Sol. Leslie, $6 62; John Smith, $2 00; Silas Jones, $22 94; estate of Nimrod Wolf, 11 27; S. C. Beckman, 45 17; Samuel Harryman, 79 27; James Campbell, 9 50; Samuel Rogers, 19 03; Richard Ristine, 3 57; James H. Counteny, 12 26; Benj. Wilcox, $7; Wm. J. Taylor, 9 50; Wm. Eaff, 22 30; George Matthews, 25 10; Samuel Flinn, 5 44; Geo. Beer, 25 35; Mary M. Wright, 3 25; Hugh M. King, $5; W. Husk, 1 25; Hunter Wallace, 37 22; Squire Boyles, 6 63; Isaac Byars, 1 25; Sam'l Stausburg, 23 37; Green Wilcox, 3 96; John N. Carnahan, $8; E. Hartwell, 11 25; Geor. C. Clayford, 14 34; Patrick Flinn, 3 92; Aaron Mead, $4; Theodore H. Johnson, $8 78. Also twenty shares of stock in the State Bank of Indiana, banck at Lafayette. Also fifty shares of stock in the Lafayette Insurance Company. Also the following

personal property, goods, chattels, to wit: 27 distilling tubs, one copper still, 4 steam boilers, one hundred and fifty hogs, two horses, 3 oxen, one sett millstones and the appraters belonging thereto, two saw-mill saws, four barrels of vinegar, one set of saw-mill irons, one Franklin stove, two ten-plate stoves, at the house occupied by Graham, one writing desk and one small desk in store, one flake stand and still-worm, two two-horse waggons, two set gears, (incomplete,) 160 bushels rye, 30 bushels barley, 700 bushels corn, two log chains, 2 ox-yokes, one saddle, one bridle and martingale, one shot-gun, one silver watch, one bazoon, 2 clarionetts. And whereas Sally Webb, wife of the said David Webb, is a co-grantee with her said
102 husband in the said lot number ninety, in said town of Lafayette, in the deed of conveyance of Mary M. Webb, under whom they derive title thereto, and so is a tenant in common with her said husband in said lot: Now, therefore, for the purpose of conveying her said interest in said lot as such tenant in common to said William M. Jenners, trustee as aforesaid, the said Sally Webb, in consideration of the premises, joining with her said husband, does hereby grant, bargain and sell un the said William M. Jenners, and to his successors, all her right, title and interest, as tenant in common with her said husband, of, in and to said lot number ninety, in Lafayette, subject to the same trust, and accompanied by the same power above expressed. In witness whereof, the said David Webb and Abraham Shoemaker and the said Sally Webb, as to her said tenantcy in common in said lot number ninety, have hereunto set their hands and seals the day and year first above written.

DAVID WEBB. [SEAL.]
SALLY WEBB. [SEAL.]
ABRAHAM SHOEMAKER. [SEAL.]

Signed, sealed, and delivered in presence of—
AB. S. WHITE.
C. WARRIER.

STATE OF INDIANA, *Tippecanoe county, ss:*

On the fifth day of November, 1838, personally appeared before the undersigned, a justice of the peace in and for said county, the above-named David Webb, Sally Webb, and Abraham Shoemaker, and severally acknoleged the above deed of their vol-
103 untary act and deed, for the uses and purposes therein expressed; and the said Sally having been examined by me separate and apart from her said husband, and the full purport and contents thereof having been made known to her, declared that she executed and delivered the same for the uses and purposes above in her behalf expressed of her own voluntary free will and accord, without coercion or compulsion of her said husband.

Given under my hand and seal the day and year above written.

CHARLES MARVIN, [SEAL.]
Justice of the Peace.

"The undersigned, attorneys, residing in Lafayette, of the creditors of Webb & Shoemaker, having inspected the above deed of trust, approve of the terms in which it is drawn, for the purposes which it purports to express.

"Dated Lafayette, Nov. 5, 1838.

"INGRAM & BAIRD.
"JOHN PETTIT.
"WILLIAM M. JENNER.
"WHITE & LOCKWOOD."

Endorsed: Received for record, Nov. 5, 1838, and recorded in book L, pages 548, '49, '50, '51, '52, '53, '54, '55, '56, '57, and 558.

SANFORD C. COX,
Recorder of Tippecanoe County, Ia.

The defendant then offered and read in evidence the following schedule of judgements rendered in the Tippecanoe circuit court, and of the date of the rendition of each judgement and amount hereof, which said schedule was so read in evidence under an agreement between the parties that the judgements thereon described were rendered in said court, and that the schedule thereof should have the same force and effect as evidence to the same extent and for the same purposes as certified transcripts of said judgements, if read in evidence
104 by said defendants, could have had, which said schedule of said judgements reads as follows, to wit: George H. Hartwell, Eldridge Lawrence, and Charles Koe *vs.* David Webb, and Abraham Shoemaker; jug. rend. Oct. 10, 1837, for $2,116 79. Micheal White and James White *vs.* David Webb and Abraham Shoemaker; jug. rend. Oct. 10, 1837, for $727 23. Joseph Wood, Thomas Wood, Joseph F. Baldwin, and Abner S. Lea *v.* David Webb and Abraham Shoemaker; judg. rend. Oct. 10, 1837, $248 72. Moses Atwood *vs.* David Webb and Abraham Shoemaker; jug. rend. Oct. 10, 1837, for $878 37. Simeon P. Smith and Rufus Green *vs.* David Webb *vs.* Abraham Shoemaker; jug. rend. Oct. 18, 1837, for 402 50. Nathan Weed and Thomas Little *vs.* David Webb and Abraham Shoemaker; jug. rend. Oct. 10, 1837, for $402 50. John T. Ellis, John W. Ruby, and William M. Rankin *vs.* David Webb and Abraham Shoemaker; judg. rend. Oct. 11, 1837, for $418 80. John P. Boyd and Daniel B. Cummings and Robert Good *vs.* David Webb and Abraham Shoemaker; judg. rend. Oct. 11, 1837, for $736 36. And thereupon the defendant proved that at the time of execution of said deed of trust to William M. Jenners, writs of *firi facias* issued regularly and in due form of law, and unexpired on each judgement above, in this bill of exceptions named as having been rendered in the Tippecanoe circuit court, at its Oct. term, 1837, and April term, 1838, were in the hands of the sheriff of said county to be executed, and that the whole of the proceeds of said nine thousand dollars note mentioned in said deed of trust was used in paying off said judgements of the October
105 term, 1837, and the costs thereon accrued, and also a debt due to Samuel Hoover from Webb and Shoemaker, and secured to

him by said mortgages above named, and under which said Davis recovered said decree in the Tippecanoe court of com. pleas, at its April term, 1851, and also in paying off other small incumbrances, were of a date anterior to the dates of said October judgements, and also the consent of all the said judgements creditors, except those of the October term, 1837, to said deed of trust, and except the lessors of the plaintiffs in this suit. and also the consent of the State Bank of Indiana to said deed of trust, and that such consent were given at the execution of said deed of trust and shortly after its execution and before the rendition of the judgement by the cir. court of the U. States, a record of which is above made a part of this bill of exceptions, and also the acceptance by said William M. Jenners, of said trust deed.

The copying of said writs of execution, of the endorsements thereon and returns thereof, by said sheriff, are omitted in this bill of exceptions under an agreement by the parties that the above statement that they aver proved shall have the same effect and be regarded by the Supreme Court as though said writs, indorsements and returns, were so copied, and were in all respects regular.

John D. Smith, a competent witness, being duly sworn, testified that during the winter of 1838 and 1839 and the spring of 1839
106 he was the editor and proprietor of a public newspaper of general circulation, printed and published in the town of Lafayette, in said county of Tippecanoe; that during the time aforesaid there was but one other newspaper published in said county, which was called the "Indiana Eagle," also printed and published in said town of Lafayette; that during the time aforesaid, while he was such editor and proprietor, no advertisement was published in said Lafayette to Free Press, of the marshal's sale recited in the deed from Jesse D. Bright, as such marshal, to the lessors of the plaintiff in this writ.

The witness here produced the files of said paper, the "Free Press," from which it appeared that no such advertisement during the period aforesaid had been published in said paper.

Mathias Peterson, a competent witness, being duly sworn, testified that during the period above named by said Smith, one Nathan Jackson (who had since died) was the editor of the "Indiana Eagle," a newspaper printed and published in the town of Lafayette, in said county of Tippecanoe; that he has frequently made enquiry among the friends, relatives, and family of said Nathan Jackson to obtain the regular files of said paper as issued during the winter of 1838 and 1839 and the spring of 1839; that he had also made such enquiry among the persons in the town of Lafayette who were in the habit of taking such paper; that he has failed to find any regular file of the weekly issue of said paper during the period aforesaid; that
107 during the winter of 1838 and 1839 and the spring of 1839 he was in the habit of examining the weekly issues of the Indiana Eagle for advertisements of marshals' and sheriffs' sales; that he had an interest in doing so, and particularly noticing such advertisements as he there found.

Whereupon the said Peterson was asked this question: whether he remembered seeing the marshal's sale, recited in the deed from Jesse

D. Bright to the lessors of the plaintiff in this cause advertised in the said Indiana Eage for three weeks successively during the winter of 1838 and 1839 and the spring of 1839. To which question the said plaintiff objected. The court sustained said objection, and refused to permit said witness to answer the same. To which ruling of the court the defendant at the time excepted. The defendant then proposed that the real estate described in the said deed of trust was at the time of the marshal's sale of the value of $11,500; that so much thereof as is described in the declaration in this suit was then of the value of $5,000. The defendant, William M. Jenners, was then sworn as a witness, by consent and agreement of the parties, who testified that immediately after the execution of said deed of trust he took possession, as such trustee, of the property, personal and real, therein described, except the oxen, one horse, the 160 bushels of rye, and sum of the choses in action, (the amont of the latter he could not state or specify,) which could not be; that he continued in the possession of the said property, with the exception aforesaid, disposing of and selling the same, and applying the proceeds as directed by said deed of trust;
108 and that within the said Webb & Shoemaker ever thereafter received from him any portion of said property, or the proceeds thereof, which so came to his possession, or exercised any control over the same. The plaintiff then proved that the distillery referred to in said deed of trust to William M. Jenners was located upon the lands described in the declaration in this case. The defendant then read in evidence the following agreement:

Agreement M.

Whereas it has heretofore been agreed between the parties that the original bill of exceptions taken in a suit in the Tippecanoe circuit court, wherein the same plaintiff was plaintiff and William P. Jenners was defendant, shall be read on the trial of said cause, under the qualifications and to the effect mentioned in the agreement: Now, it is further agreed that said Matthias Peterson, if permitted to answer the question propounded by the defendant, Jenners, which was objected to by the plaintiff in said suit in the Tippecanoe circuit court, would have testified that "he did not remember seeing the marshal's sale referred to in said question advertised in said Indiana Eagle at any time during the winter of 1838 and 1839 or spring of 1839, and that if such sale had been so advertised he thought he would have seen it and remembered it," and that the answer which said Peterson would have so given as above set forth shall be read in this cause on the trials,
109 if his evidence shall be determined to be proper and admissable, and have the same effect, and no other, as if it had been given and incorporated in said bill of exceptions.

ZEB. BAIRD,
H. W. CHASE,
For Def't.
R. JONES,
For Pl'ff.

To the evidence contained in said agreement the plaintiff objected, because the evidence was incompetent and irrelevant. The objection was overruled and the plaintiff excepted.

And the property in controversey was admitted by the parties to be worth ten thousand dollars. The defendant then read in evidence over the like objection and exception of the plaintiff the following statement and agreement :

Agreement No. .—Marshal's sale.

By virtue of a writ, to me directed, from the office of the clerk of the United States circuit court for the district of Indiana, I shall expose to sale, between the hours of 10 o'clock a. m. and 4 o'clock p. m., on the 23d day of January, 1839, at the door of the State-house, in the town of Indianapolis, the following described tracts of land and town lots, taken as the property of David Webb and Abraham Shoemaker, at the suit of George Pomeroy, Lewis C. Wilson, Elias Butler, and Wm. Baldwin, to wit : The west half of the northwest quarter of the section thirty-two, (32,) in township twenty-three (23) north, of range of four (4) west ; also the west half of the southwest quarter of same section ; also one equal fifth part of lot No.
110 10 in the school section, in township 23 north, of range 4 west; also lots numbered ninty, ninety-one, ninety-four, ninety-five, and eighty-nine, in the original plat of the town of Lafayette ; also lots numbered five, thirty-eight, fifty-nine, sixty-five, fifty-four, sixty-six, and seventy-one, in the plat of Americus, laid out by William Digly; also lots numbered one hundred and five, seventy-nine, ninety-six, and eighty-two, in said town of Americus ; also an interest, as mortgagees, in a tract of land lying Boone county, Indiana ; mortgages made by Ann to them on the east half of the northeast quarter of section ten, in town. twenty-one north, of range ten.

Should the rents and profits of the above-described property for the term of seven years fail to bring as much ready money as will discharge the judgement. I shall then and there proceed to sell the fee simple of the same to the highest bidder. Attendance will be given by

GAM'L TAYLOR, *M. I. D.*,
Per C. S. HAND, *Deputy*.

I hereby certify that the above, contained on this page and page number one hundred, attached, is a true and full copy of an advertisement published in the Indiana Journal, a weekly newspaper, published in the city of Indianapolis, in the State of Indiana ; first appearing therein on the 12th day of January, 1839, and then (on the 19th and 26th of the same month) appearing in three consecutive weekly publications of said newspaper on the several days
111 above noted, in the words and figures set forth.

TH. N. SHARPE.

INDIANAPOLIS, *September 6th*, 1858.

(*Agree't.*)—It is agreed the foregoing statement of T. N. Sharpe shall have the same effect as the best evidence of the same fact would have.

R. JONES, *for Pl'ff.*
BAIRD & CHASE, *Att'ys for Def't.*

It was admitted the trustees had proceeded to execute the tracts in said trust deed according to its provisions. This was all the evidence given on the trial of said cause. And the plaintiff prays this his bill of exceptions may be signed, sealed, and made a part of the record herein, which is done.

E. M. HUNTINGTON. [SEAL.]

And the said plaintiff files his writ of error allowed by the judge of this court, which reads as follows, to wit :

UNITED STATES OF AMERICA :

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Indiana, greeting :

Because in the record and proceedings, as also in the rendition of the judgement of a plea which is in the said circuit court, before you, judgment between John Doe, on the demise of George Pomeroy, Lewis C. Wilson, Elias Butler, and William Baldwin, plaintiff, and the State Bank of Indiana, defendant, a manifest error hath happened to the great damage of the said John Doe on the demise of George Pomeroy, Lewis C. Wilson, Elias Butler, and William
112 Baldwin, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgement be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday in December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Roger B. Taney, chief justice of the said Supreme Court, the twenty-fourth day of November, in the year of our Lord one thousand eight hundred and fifty-eight, and William Thomas Carroll, clerk of the Supreme Court of the United States.

Allowed by E. M. Huntington, judge of said circuit court for the district of Indiana, and also a citation with acknowledgement of service and agreement, which reads as follows, to wit :

The United States of America to the State of Indiana, greeting :

You are hereby cited and admonished to be and appear at a
113 Supreme Court of the United States, to be holden at Washington

on the first Monday of December next, pursuant to a writ of error in the clerk's office of the United States circuit court and district of Indiana, wherein John Doe, on the demise of George Pomeroy, Lewis C. Wilson, Elias Butler, and William Baldwin, plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgement rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf. Witness the honorable Elisha M. Huntington, one of the judges of the said circuit court for the seventh circuit and district of Indiana, this twenty-fourth day of November, in the year of our Lord one thousand eight hundred and fifty-eight.

E. M. HUNTINGTON.

I hereby acknowledge service of the foregoing citation, and hereby waive irregularity therein, and agree to enter an appearance for the said defendant in error, the State Bank of Indiana, in the said Supreme Court of the United States, on the first Monday of January next, and given in error and submit said cause for final adjudication in Supreme Court.

NOVEMBER 24, A. D. 1858.

H. W. CHASE,
J. BAIRD, *Att'y for said Bank.*

And also a bond in the penal sum of five hundred dollars, with Robert C. Gregory and Robert Jones obligors therein, which
114 bond was approved by the judge of this court, which bond and approval reads in the words and figures following, to wit:

Appeal bond.

Know all men by these presents that we, Robert C. Gregory and Robert Jones, are held and firmly bound unto the State Bank of Indiana in the full and just sum of five hundred dollars, to be paid to the said State Bank of Indiana, her certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seales, and dated this twenty-fourth day of November, in the year of our Lord one thousand eight hundred and fifty-eight.

Whereas lately, at a term of the circuit court of the United States for the district of Indiana, in a suit depending in said court, between John Doe, on the demise of George Pomeroy, Lewis C. Wilson, Elias Butler, and *William Baldwin*, plaintiff, and the State Bank of Indiana, defendant, judgement was rendered against the said plaintiff, and the said plaintiff having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgement in the aforesaid suit, and a citation directed to the said State Bank of Indiana, citing and admonishing to be and appear at a Supreme Court of the United States to be holden at Washington the first Monday of December next:

115 Now, the condition of the above obligation is such, that if the said plaintiff shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

ROBERT C. GREGORY. [SEAL.]
ROB'T JONES. [SEAL.]

Sealed and delivered in presence of—(William Baldwin's name interlined in 15th line before signing)—
H. W. CHASE.

Approved by E. M. Huntington, judge of said circuit court of the the United States for the district of Indiana. And thereupon the clerk of this court is ordered to certify the record of this cause to the Supreme Court of the United States.

And afterwards, to wit, at the court aforesaid, begun and holden at Indianapolis aforesaid, before the honorable Samuel H. Treat, district judge of the United States, to wit, on the 18th day of December, A. D. 1861. And thereupon the plaintiff presents a writ of error from the Supreme Court, a copey thereof being loged by the adverse party in the clerk's office of this court, and a citation is issued to the defendant in error, signed by the judge of this court. And the said plaintiff having tendered a bond in the penalty of $250, and which was approved, the writ of error was by the court allowed.

116 UNITED STATES OF AMERICA:

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Indiana, greeting:

Because in the record and proceeding, as also in the rendition of the judgment of a plea which is in the said court before you, judgment between John Doe, on the demise of George Pomeroy, Lewis C. Wilson, Elias Butler, and William Baldwin, plaintiff, and the State Bank of Indiana, defendant, a manifest error hath happened to the great damage of said John Doe on the demise of George Pomeroy, Lewis C. Wilson, Elias Butler, and William Baldwin, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday in December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Roger B. Taney, chief justice of the
117 said Supreme Court, the eighteenth day of December, in the year of ourLord eighteen hundred and sixty-one, and William Thomas Carroll, clerk of the Supreme Court of the United States.

JNO. H. REA, *Cl'k.*

Allowed by

S. H. TRENT,
Judge of said Circuit Court for the District of Indiana.

118 The United States of America to the State Bank of Indiana, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the United States circuit court for the seventh circuit and district of Indiana, wherein John Doe, on the demise of George Pomeroy, Lewis C. Wilson, Elias Butler, and William Baldwin, plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable S. H. Trent, one of the judges of said circuit court for the seventh circuit and district of Indiana, this eighteenth day of December, in the year of our Lord one thousand eight hundred and sixty-one.

S. H. TRENT, *Dist. Judge.*

DISTRICT OF COLUMBIA *and County of Washington, sct:*

I, Ward H. Lamon, marshal of the U. S. for the District aforesaid, do hereby certify that on this 25th day of Feb., A. D. 1862, I served the within citation on Hon. Albert G. White, of Indiana, by reading to him and leaving with him a copy of the same.

WARD H. LAMON,
Marshal D. C.

119 THE STATE OF INDIANA, *Tippecanoe county, ss:*

Before me, John A. Wilstach, a notary public in and for said county, personally appeared Robert C. Gregory, of lawful age, and after being by me duly sworn, on his oath saith that he, this day, served the within citation on Zebulon Baird and Hiram W. Chase, who were the attorneys for the said appellee, "The State Bank of Indiana," on the final hearing of said cause in the said United States circuit court for the seventh circuit and district of Indiana; that said Zebulon Baird and Hiram W. Chase are the same attorneys who signed the agreements, and submitted said cause in said circuit court for final hearing on the part of said appellee, and whose names

appear as the attorneys for said appellee in said circuit court on the final hearing of said cause; and further saith not.

ROBERT C. GREGORY.

Subscribed and sworn to before me this 21st day of January, A. D. 1862, as witness my hand and notarial seal.

[SEAL.] JOHN A. WILSTACH,
Notary Public.

120 THE UNITED STATES OF AMERICA, *District of Indiana, ss:*

I, John H. Rea, clerk of the circuit court of the United States for the district of Indiana, do hereby certify the above and foregoing to be a true and correct transcript of the complete record, and that I have attached hereto the original writ of error and citation issued on the 18th day of December, A. D. 1861, in the above-entitled cause.

In testimony whereof, I have hereto set my hand and affixed the seal of said court, at Indianapolis, the 31st day of December,
[L. S.] A. D. 1861, and of the independence of the United States the eighty-sixth.

JNO. H. REA, *Clerk.*

Filed May 5th, 1862.

In the Supreme Court

OF THE UNITED STATES.

JOHN DOE, *ex dem.*,
POMEROY AND OTHERS,
Plaintiffs in Error.
vs.
THE STATE BANK OF INDIANA.
Defendant in Error.

STATEMENT AND POINTS,

For Plaintiffs in Error on motion of Defendant to dismiss writ of Error.

This case is before the Court on writ of error to the Circuit Court of the U. S. for the district of Indiana, where judgment was rendered for the Defendant in an action of ejectment for certain lands in Lafayette, County of Tippecanoe in the State of Indiana.

On the 30th April, 1849, the declaration and notice in ejectment were served on Robert H. Cissner, Anna Walking, Joseph Resta, Sarah Webb, Jr., Owen Ball, Peter

Ball, James Wallace, Mary P. Slaven, Jane Fisher, and Joseph Cissner.

(See Record Page 3). and

Affidavits of Robert C. Gregory, Esq., one of the Attorneys for one of the Plaintiffs in error read on this motion.

The above named persons were as Mr. Gregory deposes all the persons then in the occupancy of the real estate in controversy. A portion of them were at the same time time tenants of one Patrick Kelly, of that portion of the property which was conveyed by the Defendant (the State Bank of Indiana) to Kelly by deed dated February 1st, 1849. Mr. Gregory was present when the process in ejectment was served, and said tenants of Kelly were served on the premises described in said deed from the Defendant to Kelly.

The consent rule (Trans Record, page 4,) was filed in blank with an agreement that the clerk of the Court below might fill it up with the names of such landlords or persons claiming title as should be furnished by the Defendant's Attorney, Albert S. White.

The tenants served with process were regularly called and defaulted. *Trans-record* p. 4. The blank in consent rule was filled up with the name of the Defendant.

The motion now made to dismiss the writ of Error rests entirely on the allegation that the charter of the Bank (Defendant) expired on the 1st January, 1859, before the prosecution of said writ of Error.

POINTS.

FIRST.—The Bank was not so absolutely out of existence

that this writ of Error can not be prosecuted. Its charter (S. III., Acts 1834, P. 35), provides:

"That it shall not be lawful for said Bank after the first day of January, Eighteen Hundred and Fifty Seven, to discount, loan money, or do any other banking business, and all the powers herein conferred shall cease *except those incidental and necessary to collect and close up its business.*"

1. Under this provision although the functions of the Bank as such would terminate in respect to the business of banking, yet the Corporation did not cease to exist. On the contrary it is continued in being, without any limit as to time, with such powers as were incidental and necessary to closing up and collecting its business.

2. It could therefore in its corporate name sue for a debt due the Bank.

3. It could also continue the defence of any suit to retain its property, indemnify itself against reclamation, or even to protect itself against costs.

SECOND.—In this case the Bank was the representative of the persons served with process.

1st. The litigation will conclude all those parties, and all who claim under them since the

commencement of this suit. There is therefore a pending litigation not terminated with the Banking functions, even if the charter had contained no saving clause, and there were no subsequent legislation on the subject.

2d. But by the Act of Indiana of December 23rd, 1858, (Acts of special Session 1858, P. 28, Sec. 1,) the Bank was expressly clothed with full power by assignment to have all its rights secured by any judgment in its favor.

This Court would not presume in the face of such a provision that the Bank has allowed the land in controversy to revert to the original grantor or his heirs.

THIRD.—But it is shown, in answer to this motion and suggestion, that the defendant, on the 1st day of July, 1846, conveyed by *warrantee* deed to *James Wallace* (who was served with process) a part of the real estate involved in this litigation; that on the 1st of February, A. D., 1849, the defendant, *in like manner*, conveyed to one Patrick Kelly a further part of the real estate described in the complaint; and that on the 21st day of December, A. D., 1858, the defendant conveyed to Sarah Webb (who was served with process), *in like manner*, a part of lot number 91 in the complaint, when filed and stricken out by agreement. It is also shown by affidavit that a part of the tenants in possession served with process were, at

the time of such service, the tenants of Patrick Kelly; showing that there is a pending litigation between parties in being, and that the defendant' "the State Bank of Indiana," as the warranter of the title to her grantees, undertook, by the tacit consent of the parties in interest, to represent the title of those bound by this judgment.

In the case of the "Bank of Alexandria," *v.* Patton, *et al.* 1 Robinson (Virginia) Report 499, when a corporation had assigned its rights during its existence, so that the controversy was pending on *appeal* when the charter expired, in the name of the corporation for the benefit of the assignees, the Court permitted the cause to proceed in the name of the corporation, without noticing on the record its dissolution.

Angel and Ames on Corporations (3d *Ed.*) p. 161.

FOURTH.—The citation was served in this case on Albert S. White, Esq., amongst others, who, as above shown, appeared as the attorney of the defendant before the name of the Bank was substituted in the place of the casual ejector. The attornies of record were all served with the citation. In such case the service is sufficient. *The U. S. Appellants vs. Carey and Garland.* 6 *Howard* 106 (16 *Curtis* 618, 619.)

FIFTH—On general principles this motion should be denied.

1. The expiration of the Charter of a Corpor-

ation does not affect legal proceedings already commenced against it.

Lindell vs. *Benton*, 6 *Misi.* 361.

2. A writ of error in personal actions does not abate by the death of the defendant in error, whether it happens before or after errors assigned.

Green vs, *Watkins*, 6 *Wheaton*, 260.
Spark vs. *Van Gundy*, 3 *Ham.* 305.
Hitchcraft vs. *Gentry*, 2 *J. J. Marsh*, 499.

3. In cases where by operation of law the death of a party abates a suit, there occurs nothing more serious than a mere change in the form of the record. The suit is revived for or against the personal representatives of the deceased. But there is not, nor can there be a personal representative of the defendant in this case, and no revivor is possible.

WM. C. TRAPHAGEN,
Attorney for Plaintiffs in Error.

JAMES T. BRADY.
Of Counsel.

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SACKETT & COBB, Law, Book and Job Printers, 21 John-st

In the Supreme Court of the United States.

December Term, 1863.

DOE, *ex dem.* POMEROY *et al.*
against
THE STATE BANK OF INDIANA.
No. 133.

Statement and Points for the Abatement of the Writ of Error.

STATEMENT.

On the 28th of April, 1849, the plaintiffs brought an action of ejectment in the Circuit Court for the District of Indiana, for certain real estate in the City of Lafayette in that State, and service was had upon the tenants in possession.

The State Bank of Indiana claimed title to the real estate,—and, by agreement, was made sole defendant, upon the usual terms, and pleaded the general issue. (Record, pp. 3–5.)

The cause was continued from term to term until the 24th of November, 1858, when a trial was had, resulting in a judgment for the defendant. (Record, page 5, last paragraph.)

A writ of error was immediately sued out, and a citation served,—but it was abandoned by not being perfected (see 6 Howard, 81 and 106), and the present writ was allowed December 18th, 1861, and the cause docketed in this Court May 5th, 1862.

At the last term a written suggestion and motion were filed, by leave of the Court, as follows, to wit:

"IN THE SUPREME COURT OF THE UNITED STATES.

"JOHN DOE, *ex dem.* GEORGE POMEROY *et al.* *against* "THE STATE BANK OF INDIANA.	*Error to the Circuit Court for the District of Indiana.*

"I suggest to the Court, that since the trial of the "above entitled cause in the Circuit Court for the Dis- "trict of Indiana, and before the prosecution of the "writ of error in this behalf—to wit, on the first day of "January, A. D. 1859,—the said State Bank of Indiana, "named as defendant in error in said cause, being a "Corporation created and organized in the State of In- "diana by the authority of an Act of the Legislature "thereof, was dissolved and ceased to exist as such "Corporation, by reason of the expiration of the char- "ter granted to said State Bank of Indiana.

"Upon this suggestion, I move the Court that the "writ of error in this behalf do abate.

"H. W. CHASE,

"*Att'y for the State Bank of Indiana in the Circuit Court for the District of Indiana.*"

POINTS.

I. The State Bank of Indiana was dissolved on the 1st day of January, 1859, by expiration of her charter.

1. The first section of the Act of Incorporation, approved January 28th, 1834, reads as follows: "Be it enacted," &c., "that there "shall be and is hereby created and estab- "lished a State Bank, with ten branches, "which, or so many as shall be organized "under this charter, to be known and "styled the 'State Bank of Indiana,' *and* "*shall continue as such until the first day of* "*January, eighteen hundred and fifty-nine.*" (*R. S. Ind.*, 1838, 92.) The charter further provided, that all banking powers should cease after the 1st day of January, 1857, "except those incidental and necessary to "collect and close up its business,"—and the Legislature reserved the power to establish a new Bank at any time after said 1st of January, 1857. (*Id.* 113, *Sec.* 111.) This Act of Incorporation was declared to be a public one, and will be judicially noticed by this Court. *Sec. 112.*

The provisions of the charter, above referred to, would seem ample upon the point under consideration; but, lest it shall be suggested, by the Counsel for the plaintiff in error, that the 111th Section, in reference "to closing up its business," might be construed to extend its existence indefinitely so

as to defend suits in reference to realty in which she had been interested during her corporate existence, I observe,

2. That such a construction would do violence to the language and intent of the Legislature, as expressed in the Act, making it inconsistent with itself, and in conflict with ths Constitution of the State. The Constitution of Indiana of 1816, which was superseded by the present one in 1851, prohibited the creation of but a single Bank in the State, and the State Bank of Indiana had therefore a monopoly of banking privileges during the period of her incorporation. (*Const. of Ind. of* 1816, *Art.* 10, *Sec.* 1, *R. S.* 1838, p. 49.) The Constitution of 1851 provides for two systems—one general, for the formation of separate or individual Banks, based upon stocks; the other, "a Bank "with branches" similar to the State Bank of Indiana. (1 *Gavin & Hord Stats.*, p. 87) Sec. 344 But a single "Bank with branches" is authorized by the present Constitution,—and that was incorporated by the Act of March 3rd, 1855. The 83rd Section of that Act prohibited the issuing of circulating notes by the new Bank—"the Bank of the State of Indiana,"—until after January 1st, 1857, the period when the right of the State Bank of Indiana to issue notes, or do any other banking business, expired,—and the Legislature thus recognized the fact, that the charter of the State Bank would then determine by lapse of time. The two different Constitutions only authorized the existence of one Bank with branches at any one time,—and as the new Bank was organized

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to go into business on the 1st of January, 1857, and its organization has been adjudged legal by the Supreme Court of Indiana in *McCulloch* vs. *The State* (11 *Ind.* 424), it necessarily follows, that the State Bank of Indiana must have ceased to exist at the period fixed in her charter. (*Acts of Ind.* 1855, p. 229. *See* 1 *R. S. of Ind. by Gavin & Hord*, 139.)

3. The Legislature of Indiana, by an Act approved December 23rd, 1858, one week before the expiration of the charter, expressly recognized the near approach of such expiration, by giving the Boards of Directors of the several branches authority to assign, by resolution, all the personal property and choses in action belonging to the Bank, with the right vested in such assignees to sue for and collect the same in their own names. This Act was declared to be one of emergency, and to be in force from and after its passage. But for such emergency being declared, the Act, under the Constitution, would have taken effect only after the session of the Legislature had closed and the laws were published in the different Counties of the State. The only emergency that could exist was the fact, that the charter of the Bank, for *all* purposes, would expire on the first of January following, before the law could be published in the usual way,—and thus all property not assigned would revert, and the debts due her be uncollectable. (1 *Gavin & Hord's Stats.* 157.)

4. There is no law of Indiana upon the subject of Corporations, whose charters have ex-

pired, that is applicable to this case,—and hence the common law alone is to govern. The only Act on the subject will be found in 1 *Gavin & Hord's Stats.* 267, which took effect, as determined by the Supreme Court of the State in *Turnpike Co.* vs. *Hothouse* (7 *Ind.* 60), on the 6th May, 1853. That Statute was evidently intended to apply only to Corporations organized after its passage which were created under a general law of the State, as it refers to the *three* years in which, under the general law, they are to wind up their business,—whereas the Bank was to wind up in *two* years. And, indeed, the case in 7 *Ind.* 60, *supra*, decides that the provisions of the Act can only reach new Corporations, and not those created before its passage.

In addition to these views, it may not be amiss to remark, that even if the Act in question were operative in this case, there has been no appointment of Trustees or Receivers by the Circuit Court, as required by its provisions,—and if there had been, the writ of error has not been sued out against them, but only against a defunct Corporation.

II. The dissolution of the State Bank of Indiana, by expiration of her charter, leaves no defendant in error, and the writ must abate.

1. Angell & Ames, in their work on Corporations, in § 779, lay down the law to be "upon the dissolution of a Corporation, in

"any mode, it follows, therefore, that all "suits pending for or against it, abate." They cite, in support of the proposition, *Merrill* vs. *Suffolk Bank* (31 *Maine*, 57), *Salmarsh* vs. *Planters' &c. Bank* (17 *Ala.*, 761), and *Greeley* vs. *Smith* (3 *Story*, 657),—and those authorities fully sustain it. The case of *Lindell* vs. *Benton* (6 *Misso.*, 361), referred to in the note by them, as announcing a contrary doctrine, merely decides that the dissolution of a Corporation after an attachment against it has been sued out, *and its debtor garnished*, will not operate to deprive the attachment plaintiff of a vested right in the money in the hands of the garnishee to satisfy his debt.

2. The writ of error here is an *original* writ, issuing, in effect, out of this Court, to bring up the record of a cause that alleged errors may be examined, and the judgment affirmed or reversed as the law may require. (2 *Tidd's Pr.*, 1134; *Conkling's Tr.*, 686.) The parties in the inferior Court, or their heirs or representatives, must be parties here,—and to that end must be duly cited. (*Conkling's Tr.*, 686.) It is true, that an Attorney cannot withdraw his name from a cause, after final judgment, so as to avoid the service of the citation. (*United States* vs. *Curry*, 6 *Howard*, 109.) But the death of his client revokes his authority to appear, and the service of a citation upon him thereafter is a nullity.

3. The 15th rule of this Court provides against the abatement of causes in error or on appeal between natural persons, by authorizing the heirs or legal representatives, as the char-

acter of the subject-matter of the litigation may require, to be made parties. But here is a Corporation, civilly dead, leaving no heirs or representatives—no party upon whom process can be served, or to whom notice can be given, or on whom the judgment can operate. This is not the first instance where parties have failed to obtain the aid of this Court to correct alleged errors because there was no provision of law whereby the cause could be brought properly before the Court. (*Hunt* vs. *Palas*, 4 *Howard*, 589.)

I respectfully submit that the writ of error must abate.

H. W. CHASE,

Att'y for the State Bank of Indiana in the Circuit Court.

DOE EX DEM POMEROY
vs.
THE STATE BANK OF INDIANA. } No. 133.

REPLY TO POINTS OF BRIEF FOR PLAINTIFF IN ERROR.

1. The first point violates a cardinal rule of construction; it cites one provision only of the statute. The first and eleventh section must be construed together. (Smith on Stat. and Const. Law, 710, sec. 575.)

2. The doctrine that the judgment below is binding upon all parties because the Bank represented their interests is erroneous. A judgment in ejectment is not conclusive even between parties. (Adams on Eject. 315, notes.)

3. The allegation that there is a litigation pending between living parties is erroneous. Kelly, who is said to have owned a part of the land, never was a defendant, and those served were defaulted without litigation. The court below did not decide that the parties served with declaration, &c., were the owners of the lands, but that the Bank had the title. If that record is good for any purpose, it cannot be impeached by affidavits of the attorneys, showing that the Bank had parted with her title before suit. Perhaps she did, and it may have been shown that after she conveyed to Wallace in 1846, and to Kelly, Feb. 1st, 1849, and before April, 1849, they reconveyed to the Bank. Is there any authority justifying this court to go behind the finding and judgment of the circuit court and try the case *de novo* upon affidavits? A judgment rendered for a corporation without objection after expiration of its charter, estops the defendant from denying its corporate existence at the date of the judgment. (7 Wend., 541.)

The case of Bank of Alexandria *vs.* Patten, (1 Robinson, 499,) is clearly distinguishable from the present case. That

was a bill in chancery to subject real estate fraudulently conveyed to the payment of debts. The circuit court dismissed the bill, an appeal was taken, and, pending the appeal, the bank assigned the debt to trustees, and afterward was dissolved. Because of the assignment *after* suit brought, and that the decree of the court below would be an estoppel, the suit was suffered to progress in the name of the bank. Here no claim will be lost, because the judgment below does not preclude a fresh action against the parties now in possession of the lands, and there is no pretense that the claim has been assigned since the defence was made in the court below. Other reasons will also occur to show the inapplicability of the case.

See Rider *vs.* Union Factory, 7 Leigh, 154, exactly in point, in favor of the abatement of the writ.

H. W. CHASE,

Attorney, &c.

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1862.

JOHN DOE, *ex dem.*, POMEROY, *et al.*, Appellants,
vs.
THE STATE BANK OF INDIANA, Appellee,
} In error to the Circuit Court, District of Indiana.

The lessors of the plaintiff in error, as well as the defendant, claim title to the premises in controversy under David Webb. The lessors, by virtue of a deed from the U. S. Marshal, made in pursuance of a sale by him under execution, and the defendant makes title through a trust deed executed by Webb to one William M. Jenners as trustee, before the rendition of the judgment on which the execution mentioned issued.

The record made part of the bill of exceptions, shows a regular judgment on the 19th day of November 1838 and execution issued upon it on the 17th of December 1838 and a return on the 20th of May 1839. The return reads as follows: "The within annexed writ of execution in case of "George Pomeroy, Lewis O. Wilson, Elias Butler and Wil-"liam Baldwin vs. David Webb and Abraham Shoemaker, "came to hand on the 19th day of December, 1838. On the "27th day of December, 1838, by virtue of the within annexed "writ of execution, the defendants herein, having no personal "property whereon to levy, I levied upon, seized and took "in execution, as the property of the said defendants, David "Webb and Abraham Shoemaker, all the following describ-"ed tracts and parcels of lands and lots" (here follows the "description). "And afterwards on the — day of ——— "in the year 1839, at the State House door, in the town of "Indianapolis, in the County of Marion, and State and dis-

"trict aforesaid, first having given due and timely notice of "the time and place of sale, as required by law ; and having "first, then and there, offered for sale the rents and profits "for the term of seven years, of all the said lands, lots and "premises, and having no bid therefore, I did then and there, "by virtue of, and in pursuance of the said writ of execution, "expose to sale, and then and there sell to George Pomeroy, "Lewis O. Wilson, Elias Butler and William Baldwin, all "the above described tracts and parcels of land, lots and "premises, in fee simple, for the sum of sixty dollars, they "being the highest and best bidders, and that being the "highest and best price bid or offered for the same, said land "lots and premises having been sold separately, and said "sum being the aggregate amount of said sales, which sum "has been duly accounted for and settled by said purchasers.

"GAMALIEL TAYLOR,
"Marshal Indiana District
"Per C. J. HAND, Deputy."

The return shows that the Marshal had "*given due and "timely notice of the time and place of sale, as required by law.*" This return stands as true till disproved.

There was no such proof and had there been the manner of advertising was immaterial, as there was no pretence that the plaintiffs in the execution had been instrumental in procuring an improper notice of the sale. An irregularity of the Marshal as to a matter over which they had no control, and with which they had no connection could not affect them.

In Kilby vs. Haggin, 3d J. J. Marshall's (Ky.) Reports 213 the Court say "nor could the sale be affected by any ir- "regularity or defect in the advertisement, unless Haggin "(the execution plaintiff and the purchaser) had been privy "to it." And the same Court, in Sander's heirs vs. Norton "4 Monroe's (Ky.) Reports, 465 say "That purchasers gener- "ally are not effected by the erroneous or irregular proceed- "ings of the officer making the sale, is long since well set- "tled; and we conceive the same principle applies to plain- "tiffs in executions, as to every erroneous act of the Sheriff

"over which they have no direct control and which they "have not been instrumental in producing."

It will be said, here is a sale for *sixty dollars*, of property shown to be worth *eleven thousand dollars;* that the price was merely *nominal* and furnishes strong evidence of fraud in the sale, &c. But the record in addition shows there were judgments rendered in the Tippecanoe Circuit Court against Webb and Shoemaker as follows :

In favor of	Hartwell,	et al.	Oct. 10, 1837	for $2,116 79
"	White,	"	" "	367 99
"	Manser	"	" "	281 78
"	Weed	"	" "	727 23
"	Wood	"	" "	248 72
"	Atwood	"	" "	878 37
"	Smith	"	" "	402 50
"	Weed	"	" "	402 50
"	Ellis	"	" "	418 80
"	Boyd	"	" "	736 36
	Judgments of October Term 1837			$6,531 04
In favor of	Harris,		April 9 1838	for $594 07
"	Clark et al.		"	259 12
"	Harris		"	1,066 28
"	White		"	1,105 50
"	Pettit		18	567 17
"	Kemball,		Nov. 6	800 37
"	McCormick		"	188 81
"	Cook		"	104 45
"	Suydam, et al.		"	323 51
"	Wiley et al.		April 12	252 59
"	Frost et al.		" 13	645 80
"	Vermen et al		" 13	1,037 30
"	Fountain, et al.		Nov. 6	428 93
"	Curtis, et al.		" 7	658 76
"	Stinson, et al.		" 7	284 80
"	Lee, et al.		" 7	271 72
"	Smith, et al.		" 7	452 43
"	Tappan, et al.		" 7	408 82
	Judgments in 1838 up to Nov. 7			$9,766 78

Also that there was a still older mortgage, on which a decree was subsequently rendered in favor of Davis for $2,365 00 and some other still older liens.

It will be observed, that the judgments above are set down merely at the principal, including neither costs or interest, and no account is made of liens still older than the judgments, except the one in favor of Davis which is still in force.

The purchaser at the Marshal's sale, by that purchase, could only acquire the legal title to these lands, subject to all liens that were prior in date to the 19th day of November, 1838, (the date of the judgment under which the sale was made.)

What was, at the time of the sale the value of these lands, after deducting the prior liens?

The liens were nearly double the value of the entire property, and a sale under even the latest of the prior judgments, while the lien continued, would absolutely have defeated the title acquired. The purchasers did not get a title of any value at the time, but a mere naked legal title, with the probability that it might acquire future value.

The money raised at the time of the execution of the trust deed, was applied towards the extinguishment of the judgments of October 1837, after paying some prior liens. We suppose the parties raising the money to pay these earlier liens might, while the lien of the October judgments continued, have been substituted to the rights of the plaintiffs therein so far as they were paid. But it is unnecessary to enquire particularly as to such right, as the other judgments on which no payments were ever made, and which certainly, as against these purchasers, constituted a lien, with the Davis mortgage, amounted to a sum larger than the value of the whole property.

These facts disclosed in the transcript of the record in this cause show that a *full and more than full price* was paid for the title acquired, thus encumbered, without at all taking in-

to the account the shadow on the title created by the trust deed.

The fact that the mass of these liens were allowed to expire by a failure to enforce them for some nine years after the purchase, and thus gave value to the title, cannot affect the value of that title when it was acquired. And it follows, that as there was no proof of any inadequacy of price, that no question as to the effect of inadequacy, great or small, could arise. The purchasers got a mere *chance* of future benefit, paid its full value, and in morals as well as in law, have the right to any advantages accruing from it.—Merriweather's Adm'r vs. Herran, 8 B. Monroe (Ky.) Reports, 162.

The Marshal's sale was made at Indianapolis, in Marion County, the land being in Tippecanoe. Was such sale void?

This question, as also whether the trust deed under which the defendant claims, is fraudulent and void as to the lessors of the plaintiff were passed upon by the Court below in this case and discussed by the Supreme Court of Indiana in Jenners et al. vs. Doe *ex dem.* &c., 9 Indiana Reports 461. The titles in both cases being identical, though the realty in each was different.

The State Court, or rather the Judge delivering the opinion says, the trust deed is void; but the Court decided the Marshal's sale inoperative because it was not made in the county where the realty is situated. The Court below, in the case at bar, held the Marshal's sale was regular and valid, but that the trust deed was operative and carried the title.

THE MARSHAL'S SALE.

There is contained in this record evidence bearing on the sale that was not before the State Court. This evidence consists: *First*, of the order of the Circuit Court directing the execution of a deed, by the successor of the Marshal who made the sale; the petition and order of the Court are those contemplated by the Act of Congress of May 7th, 1809, when a Marshal goes out of his office without executing a deed.

It is an order in the original case, and as much a part of it, as the ordinary order confirming a deed, when that order is necessary.

This order, it is submitted; is an adjudication by the Court as to the regularity of the Marshal's sale, and the propriety of its being perfected by the execution of a deed; and cannot be questioned collaterally.—Voohees et al. vs. Jackson, *ex dem.*, Bank of U. S., 10 Peter's Reports, 449 (12 Curtis 193.) Geignon et al. vs. Astor et al., 2 Howard 319, (15 Curtis 125) Forsyth vs Balance, 6 McLean 567.

Second, This record shows that from the organization of the U. S. Circuit Court in Indiana, till May 1841, there were thirty sales of realty under executions issued on judgments rendered by the Court (not including the one under consideration); of these, four were in the Counties where the lands were located, four were made at places not named in the return, and twenty two were made at Indianapolis, the lands not being in Marion County. Among the purchasers at these sales were the lawyers, who had the most extensive practice in that Court during the period named.

The act of Congress of May 19, 1828 directs that the final process in the Courts of the United States except their style &c., shall be the same as are now in the State where the Court is held.

The Indiana Statute of 1824 (Revised Statutes of 1824 p. 189) prescribes no *place* at which execution sales of either real or personal property shall be made. It leaves the *place* of sale to be selected by the Sheriff.

No change was made in this particular until the Statute of the 13th February, 1841 (Act of 1841 p. 130, sec. 4,) which enacted that execution sales of realty should be made at the door of the Court House of the County in which the lands lie. And this became the rule regulating Marshal sales, by the rules of the United States Circuit Court, for the district of Indiana at the May Term 1841. Since which time such sales

have been made at the place designated by this statute, in obedience to the rule adopting it.

But in the case of Jenners et al. vs. Doe *ex dem.* Pomeroy et al. *supra* the Court say under the statute of 1824 though the place of sale was to be selected by the Sheriff, yet his discretion was bounded by the limits of his County, and the Marshal's discretion must be exercised within the same limits.

That the sheriff must make such sale within his County, it is submitted, results not from any provision of the execution law of 1824 but from that in relation to sheriff, by which his power is confined within the limits of his County.

The statute of the State defines the bailiwick of the sheriff, beyond which his power does not extend, and within which any descretion, vested in him must be exercised.

So the act of Congress fixes the bailiwick of the Marshal within which his power and discretion is confined.

By the Act of Congress of the 24th September, 1789 and the act creating the district of Indiana, the Marshal's bailiwick is made coextensive with the State, and he is "to execute" throughout the district all lawful precepts to him directed, and issued under the authority of the United States.

If there had been a special Act of Congress creating the district of Indiana and which had provided that final process and the manner of its execution should be as follows, and then copied the execution law of 1824, substituting only the word "Marshal" for the words "sheriff or other officer" throughout the act; in such an act of Congress there could not be found any regulation as to the place of making execution sales, nor any limit to the discretion of the Marshal in selecting the place of sale.

That he must sell within his district would not result from such act, but from the one defining his bailiwick, and confining his powers to its limits.

Suppose the Marshal should have levied in Tippecanoe County upon cattle or other live stock, and found it necessa-

ry or convenient to remove them across the County line, to have them properly kept and cared for until the sale, would this amount to a conversion and make him a trespasser as such acts would, if done by the sheriff of Tippecanoe County?

By the Act of Congress of the 3d of March 1791, under certain circumstances the Marshal might prepare in his district a place to keep his prisoners. Had he prepared such a place at Indianapolis arrested a debtor on a *ca. sa.* in Tippecanoe County, removed him to Indianapolis, and then imprisoned him would he have been liable for a voluntary escape to the execution plaintiff, and for a false imprisonment to the defendant?

Not only does the record show this sale to have been in accordance with the practice of the Court, but the finding of the Court is expressly to that effect, and under this finding, the sale at Indianapolis is to be held regular and proper, if it would have been so held had there been an express rule of Court authorizing the Marshal to make all sales of realty at that place. Curtis vs. Cin. R. W. Co., 6 McLean 403,—Duncan vs. United States, 7 Peters 613, (7 Curtis 725.)—Wayman vs. Southard, 10 Wheaton 39 (6 Curtis 311.)

This is a question of practice in the Circuit Court and the ruling of that Court would seem conclusive.

THE TRUST DEED.

The statutory provision in force at the date of the deed—Revised Statutes of Indiana 1838 p. 225, sec. 9 enacts:—"That person who shall be a party to * * any assignment, grant, gift, deed or other conveyance of any estate or interest in land," &c., "made or executed with a view to defraud prior or subsequent purchasers, *or to hinder delay or* defraud creditors" * * * "shall on conviction be imprisoned," &c., * * * "and *all such sales, deeds, conveyances and assignments shall be absolutely null and void.*

The deed of trust in question, is a conveyance by Webb and wife and Shoemaker, dated 5th November, 1838, conveying to William M. Jenners all the real estate embraced by the Marshal's deed and assigning to him certain choses in action, &c., to be converted into money and applied as provided for in the deed. There are in the deed certain provisions which we insist bring it literally within the statute quoted above and render it *null and void*.

The deed is too long to quote entire, and a fair view of the question stated may be had from an examination of parts of it.

It recites that Webb & Shoemaker "are largely indebted to "sundry persons, and whereas it is believed that their prop- "erty would fall far short of satisfying those debts if collec- "tions were sought to be enforced by the summary and usual "process of law"————"whereas an advantage would "arise to the condition of Webb & Shoemaker by placing in " the hands of a trustee for disposition, as well the proper- "ty of said parties subject to execution, as choses in action "not subject to execution, thereby enlarging the fund subject "at law to the payment of those debts *and avoiding the sacri- "fice of a sheriff's sale as well as a mutual advantage to said "Webb & Shoemaker*, from the prospect of realizing a greater "sum of money for their property, and discharging a greater "portion, and as they hope, all of their debts." Then follows the grant to Jenners and his successors, after which the trust and powers are thus descrrbed:

"And it is hereby expressly declared and provided, that "the grant, bargain, sale, conveyance, transfer and assign "ment hereby made is to be subject to the following trusts "and accompanied with the following powers, that is to say: "the said trustee and his successors may from time to time "by proper and apt instruments in writing or other contracts, "bargain, sell, convey, transfer, assign and dispose of all and "singular the property and things hereby conveyed to him

as such trustee, to any person or persons for money or other "valuable article, to be afterwards by him converted into "money, or securities for money, upon such time and "terms as he shall think most conducive to the interests here- "by intended to be promoted, *provided however, that he shall "not make sale of any part of the real estate hereby conveyed "within the period of eighteen months from this date, unless a "fair price can within that time be obtained therefor, and at any "time when he shall make sale of any part of the real estate, he "shall not in such contract of sale give a longer credit than five "years upon any part of the purchase money, he shall have power "to rent, lease and hire the said real estate from time to time, but "no lease hold term to exceed three years;* he may allow the "said parties of the first part to continue in his name and for "his use as such trustee in the distilling business on that "portion of the premises now used for that purpose, and "allow them to enjoy such possession of said premises and "personal property as may be necessary and convenient for "conducting such business, and the business of fattening hogs "or the like, which usually is connected with distilling, al- "lowing them such reasonable compensation for their servi- "ces as may be necessary for their comfortable sustenance, "but having at all times the control and ownership as such "trustee of said business and the property employed therein, "with the right to take immediate possession at any time when he shall think proper to do so."

If the deed comes within the statutory provision quoted, if it appears on its face to be "*made with a view to hinder, de- "lay or defraud creditors*, it is made in violation of a distinct and clear statutory prohibition, is in violation of law, and would be void, even without the express declaration of the statute that it "*shall be absolutely null and void.*" The State &c., vs. The State Bank et al., 5 Indiana Reports 353.

The rule as to such deed, as laid down by Burrill is: "And when, on a trial before a jury an assignment shows on

"*its face*, that it was made in trust for the use of the assignor, "either in whole or in part, the Court is bound to pronounce "the transaction void, without submitting the question to the jury." Burrill on Ass't., 172. Goodrich vs, Downs, 6 Hill's (N. Y.) Reports, 438.

There is no duty of a Court clearer than that of determining in every instance the meaning, scope and effect of written instruments. If it is an instrument *void* as contrary to law, the Court must so pronounce it. There is no question of fact to be submitted to the jury.

The deed speaks for itself, the purposes of the deed must be those declared by it, the trusts and powers defined by it, can only be determined by its language. If these purposes, trusts and powers are lawful, the deed is valid *on its face*, and could only be impeached by extrinsic evidence, if unlawful it is *null and void* without reference to extrinsic facts. Burrill 173, Ward vs. Trotter. 3 Monroe's (Ky.) Reports, 1.—Henderson vs. Bliss, et al., 5 Indiana Reports, 100.

It may be contended that 1st Revised Statutes, 1852 p. 303, sec. 21, requires the question of intent to be submitted to a jury.

Whether the Legislature intended to introduce a new rule is scarcely necessary to enquire, as that enactment is expressly confined to cases arising under the act of which it is a part, though it would seem scarcely to effect the rule, that the Court must determine the legal character and effect of all written instruments. Under a precisely similar statute with that above cited, the Courts of New York have held where the deed itself furnished the evidence of the intent to delay or hinder creditors, the Court is bound to pronounce the deed void without submitting the question to the jury. Goodrich vs. Downs 6 Hill, 438. Cunningham vs. Freeborn, 3 Paige 557, 564. Mr. Justice Buller, in Eastwick vs. Cailland, 5 Term Reports 440 says: "Fraud is sometimes a question of "law, sometimes a question of fact, and sometimes a mixed

"question of law and fact. *If we are to decide on the face of the "deed itself, that is a question of fraud in point of law.*" Burrill p, 398 says. "Assignments are constantly declared void "*on their face* * * when they contain any provision "expressly intended to hinder, delay or defraud a creditor."

Does this deed on its face appear to have been "made with a view to hinder or delay creditors?"

The recital shows the purpose to be "*avoiding the sacrifice "of a sheriff's sale, as well as a mutual advantage to said "Webb & Shoemaker from the prospect of realizing a greater sum of money*" &c.

The purpose here declared is to avoid a sacrifice of the property, that is, a sale of it for less than its full value, to place it beyond the power of any creditors to force sales, and this purpose, though declared to be confined to execution sales, is shown by a subsequent part of the deed to extend to sales under the deed. The whole scope and effect of the deed is evident from the recital quoted, when connected with the following clause as to the power conferred on the trustee, "*provided however, that he shall not make sale of any "part of the real estate hereby conveyed within the period of "eighteen months from this date, unless a fair price can within "that time be obtained therefor.*" It will be claimed that this latter clause merely imposes on the trustee a duty that would have existed without it.

This was not so understood by the parties executing the deed, nor is it in any wise true. The duty of the trustee after the expiration of the eighteen months would have been within a reasonable time to sell for the best price he could get, whether he could get a fair price or not. He then must sell though at a sacrifice. This would have been his duty immediately upon the acceptance of the trust, had this provision been omitted, and the performance of this duty the creditors could at once have enforced through the medium of the Courts. But with this clause in the deed, the trustee could

not sell, nor could the creditors compel him to sell, unless it could be done without a sacrifice, till the time fixed had elapsed. The duty of the trustee and the acts he could be compelled to perform before and after the expiration of the eighteen months were essentially different. Before, he could only sell for a *fair* or full price, after, for the best price he could get, though it involved a sacrifice.

The necessary effect was not only to "*prevent the sacrifice of a sheriff's sale*," but absolutely to withdraw the property from the power of the creditors for eighteen months. By no means known to the law could they within that time compel its sale, and they must necessarily be "*delayed and hindered*" for that period.

The case of Ward et al. vs. Trotter, 3 Monroe, 1, *supra* is directly in point. There the object stated in the recital of the deed was to *prevent a sacrifice* and an attempt was made to withd aw the property from the power of the creditors for a year, the assignee not being permitted to sell within that time. The Court say, "There is certainly nothing dishonest "in making a conveyance with intention to secure the pay- "ment of a man's debts nor in doing this, can it be deemed "unlawful to prefer, as it was the intention of Kelley to do "in this case, some of his creditors to others: for a man may "lawfully pay some of his creditors before others, so he may "lawfully secure the payment of some in preference to oth- ers."

"But besides the intention to secure the payment of his "debts, and the intention of preferring some of his creditors "to others, Kelley has avowed another and further intention "in making the deed of trust to Ward; and that is to pre- "vent his creditors from sacrificing his property at their "discretion. How were his creditors to sacrifice his proper- "ty? They could only do so by taking it and having it sold "under execution in satisfaction of their debts, and this it was "lawful for them to do. The deed must therefore have been

"made, according to the repeated avowals of Kelley on its "face, with the intent or purpose to prevent or hinder the "creditors from effectually using the lawful means of obtain- "ing the payment of their debts. Such an intention is evi- "dently dishonest and unlawful, and a conveyance made "with that intent or purpose, is forbidden by the statute "against frauds and perjuries, and declared to be void as to "creditors and purchasers."

The deed immediately after the last quotation above, proceeds, "*and at "any time when he (the trustee) shall make sale of any part of the real estate "he shall not in such contract of sale give a longer credit than five years, "upon any part of the purchase money.*"

Take this, with the provision that he shall not sell for less than a fair price, and the purpose to delay creditors is unquestionable. There is a delay of eighteen months unless a fair price can be had, with a trustee of the debtor's own selection, the sole judge of what is a fair price, giving him rather than themselves, the right to judge of what is a fair price, allowing neither the creditors, directly, nor through the legal tribunals any control, Here is a delaying of creditors for eighteen months, followed by a further delay of five years or more, for if the deed is valid the trustee could at any time after the expiration of the eighteen months sell on a credit of five years, and the creditors could not complain. Nor could a Court compel a sale for money on a shorter credit.

Even take the rule of law to be, that a power to sell on *credit* may be given, and it does not help the deed. Such power would be to sell on a *reasonable* credit. What that reasonable credit might be, would be a matter the courts could determine, and they would hardly think of holding that the power was complied with by selling on a credit of *five years*. No such adjudications have yet been made.

This deed contains a further provision of delay, the power "*to rent, lease "or hire the said real estate from time to time but no lease hold term to exceed "three years.*"

There is provision after provision for delaying creditors.

First, a delay of eighteen months waiting for a full price; then leases of three years, followed by sales on five years credit. Let a trustee, selected by the debtor, under the power here granted, exercise them to produce the greatest possible delay, and keeping strictly within the powers conferred, he could prevent the creditors from realizing from the realty conveyed, for ten long years. And yet, it may be claimed that the conveyance in question is *legal* and not one declared *void* by our statute.

The New York Courts have gone infinitely further than is necessary for our purpose in this case, holding an authority to the trustee to sell on *credit*, (which of course would be reasonable credit, to be judged of by the Courts,) "would render such deed as this absolutely void, as made within their statute," "to hinder, delay, or defraud creditors," a statute, if quoted correctly by their Courts, identical with the one governing this case. Meachum vs. Stearns, 9 Paige, 406.—That was a proceeding against a trustee by the assenting creditors. The trustee was authorized by the deed to sell on credit, but had sold on unreasonable credits, &c. The Chancellor says: "It was moreover a breach of his duty as "a faithful assignee for the benefit of the creditors to retail "the property in this way on credit. For the creditors were "entitled to have the assigned property converted into money "and applied to the payment of their debts without any un-"necessary delay. And the assignment would itself have "been clearly fraudulent, if the assignors had in terms directed "their assignee to dispose of the property in the manner in "which it was disposed of." The question as to the effect of authorizing a *credit* to be given is pretty fully discussed in Barney vs. Griffin, 2 Comstock's, (N. Y.) Reports, 365. But more elaborately in Nicholson vs. Leavitt et al. 2 Seldon 510. There the deed provided for sales by the trustee *'for cash or upon credit or partly for cash and partly on credit.*"

There is a further provision in this deed, that makes it

void within all decisions. The provision that the trustee may permit the grantors to continue the distilling business, *"allowing them such compensation for their services as may be necessary for "their comfortable sustenance."*

This is not a clause for a reasonable compensation for services actually rendered or to be rendered. But it is much more than this. The compensation as it is called, is not in anywise dependent on the services rendered or to be rendered, but though the services are of little or no value, the compensation is to be so much *as may be necessary for their comfortable sustenance.*

Suppose the services for a given period worth one hundred dollars but for the same period five hundred dollars is *"necessary for their comfortable sustenance,"* and the trustee paid the latter sum would he not be strictly within the letter and spirit of the power conferred on him? And could any one claiming under the deed object to such payment?

It is a provision for the *"comfortable sustenance"* of the grantors with their families out of the trust property, sought to be legalized by calling it *compensation*, evidently with the view to defraud creditors, by thus withdrawing a part of the trust property from the power of the creditors, and appropriating it to the benefit of the debtors.

Whether the anticipated benefit was realized by the debtors is a matter of no consequence. As to this objection to the deed, several of the authorities cited above are directly in point. Burrill 168, says: "Hence it is a general rule in "American law, that a clause or provision in an assignment "by which any benefit or advantage is reserved to the debtor "at the expense of the creditors whether such benefit be tem- "porary or permanent, whether it be in the shape of pay- "ment of a gross, or annual sum, *employment at a compensa- "tion* or otherwise, and whether reserved to the debtor him- "self or for the support of his family, is a fraud in law, and "vitiates and avoids the whole assignment."

The Judge who pronounced the opinion in the State Court, discussing the validity of this trust deed says:

"The Court held the deed void upon its face, as a ques-
"tion of law. It is contended that the Court could not thus
"decide upon the character of an assignment—that it should
"in all cases, refer the instrument to the jury, in connection
"with the facts. Our statute enacts that every assignment
"&c., made with intent to hinder, delay or defraud creditors,
"shall be void; and further provides, that the question of
"fraudulent intent shall be a question for the jury. 1 R. S.
"pp. 302, 303, ss. 17, 21.

"These provisions have declared, not changed the law, as
"heretofore expounded by the Courts of this State.

"When a written instrument is offered in evidence, it is
"first submitted to the Court. The Court decides upon its
"legal effect. That point being determined, it then goes to
"the jury, or is rejected, according to its legal effect. For
"example, an assignment to a trustee as in the present in-
"stance. It is first submitted to the Court, and if the Court
"determines that the legal effect of the instrument is to de-
"lay creditors, the instrument is rejected. There is no occa-
"sion to go into the question of intent; for that could not
"aid a void instrument. Intent will not control the plain
"legal effect of the terms of an instrument; and if that effect
"would be to delay creditors, any intent that the party might
"have had to the contrary would not help the matter. Sup-
"pose an assignment provided that the assignee should hold
"the property, and use, or permit the assignor, or his agent, to
"use, trade upon, and improve it, for ten years, in order so to
"increase its value that it would pay all the assignor's debts;
"and that the assignee should then sell it on credit for the
"best possible price, pay the debts, and return the overplus
"to the assignor; or suppose the terms of the instrument
"should be, that fifty cents on the dollar should, at the end
"of ten years, be paid to the creditors, and the property then

"be returned, so far as it remained unsold, in specie, to the "assignor, would an intent of the assignor, however stoutly "asserted and proved, change the legal effect of such an in- "strument so that it would not operate to hinder, &c., credi- "tors? Would it not in express terms, violate the statute? "Most certainly it would. But if the Court finds the legal "effect of the instrument to conform to the law, it so far goes "into the case, as valid; yet the creditors may still allege and "prove that surrounding, extrinsic facts show that it was "made with intent to defraud—as that the assignees are irre- "sponsible, worthless men, the tools of the assignor, and in "secret collusion with him, permitting him to remain in the "possession and use of the property assigned, for his own "private benefit, &c.—and all questions of this kind, showing "a fraudulent intent in opposition to the fair legal effect of "the instrument, are for the jury. Before the statute, it had "been a question whether certain of these facts being proven "—as that possession did not accompany the deed, &c.,— "the Court should not declare fraud *per se*. The statute en- "acts, in conformity to the conclusion at which the Courts "of this State had arrived, that such facts shall go to the "question of intent and be for the jury. This is the plain "reading of the statute. It does not thus refer the question "of intent to delay, &c., as the legal effect of the instrument "will disclose that to the Court; but the intent to defraud "alone. See Bingham vs. Tillinghast, 3 Kernan, 215, (Nutter vs. Harris, this volume, *ante*, 88.)

"The question now arises whether the legal effect of the in- "strument in this case is to unlawfully delay creditors; for "some delay is necessarily incident to the carrying out of "every assignment, and such delay is not embraced by the "statute. That is aimed at a delay growing out of the "terms of the instrument itself, and forming a part of its de- "sign and object; and we think the assignment in question "clearly falls within it. The assignment gives the trustee a

"year and a half before selling the property, and the privi-
"lege of then selling on five years' time—thus postponing
"creditors six years and a half, besides the additional delay
"that might be incident to collecting the sale notes, those of
"them, the makers of which might happen to be solvent at the
"expiration of so long a period. If such an assignment does
"not illegally delay creditors, one postponing them sixty
"years could not be held to do so."

All of which is submitted.

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Attorneys for Paintiffs

Supreme Court of the United States.

DECEMBER TERM, 1863.

THE STATE BANK OF INDIANA, DEFT. IN ERROR,

ads.

JOHN DOE, ex. dem., POMEROY, et. al. PLTFF. IN ERROR.

In Error to the Circuit Court for the District of Indiana.

The lessors of the plaintiffs brought ejectment for several lots of land in the city of Lafayette, Ind., and the State Bank of Indiana was made sole defendant, on the usual terms, and, upon trial, had judgment. Both parties claim title through one David Webb, the defendant under a trust deed made by said Webb and one Shoemaker to William M. Jenners, on the 5th of November, 1838, and the lessors of the plaintiff by virtue of a Marshal's deed, based upon a judgment of said Circuit Court for the District of Indiana, rendered November 19, 1838.

Two questions are presented for the determination of this Court:

1. Is the deed of trust from Webb and Shoemaker to Jenners void?

2. Is the Marshal's deed to the lessors of the plaintiff valid?

If either of these questions receive a negative answer, the judgment of the Circuit Court must be affirmed.

The case was, in fact, tried by Judges McLean and Huntington, by agreement, at chambers, but the record only shows the presence of Judge Huntington when the formal judgment was entered in Court. This fact is alluded to only as the foundation of a suggestion, that the questions relative to the trust deed have already received the careful consideration of one of the learned Judges of this Court, whose opinions have ever been justly regarded as entitled to great respect.

1. The deed of trust (Record, pp. 45–53) is not void under the statute of Indiana in force at its date, when construed in connection with the other evidence in the case.

We insist that the deed is good and valid upon its face, and shall so argue, but if there were any doubt upon that point it is dispelled when it is read in the light of the surrounding circumstances of this case.

At the time the deed was made the record shows that there were judgments and executions against Webb and Shoemaker for over $10,000, and two mortgages upon the realty conveyed to Jenners amounting to several thousand dollars more. On the 7th of October, several weeks before the rendition of the judgment under which the lessors claim, judgments for over $2,500 more were rendered against Webb and Shoemaker, so that there were prior incumbrances upon the land to the extent of about $15,000, while all the realty was worth not over $11,000. (Record, pp. 53–55.) Jenners, the trustee, took possession of all the property conveyed to him except a small quantity of rye and some choses in action which could not be found, and the grantors in the deed never had any control of any part of the assets. There is no evidence tending to impeach the deed unless it is held void upon its face.

The trust deed eviuces a desire in the grantors to make a fair distribution of their assets among their creditors. No reservation is made for their benefit until after full payment of all their debts. The proceeds of the $9,000 loan from the Bank was applied to the payment of the oldest liens, and very properly the debt thus created was placed in the condition of the incumbrances thereby discharged. Webb and Shoemaker also assigned some $13,000 of debts due them which were not

subject to levy and sale on execution, thus clearly showing an intention to pay rather than hinder the payment of their debts.

It is urged by the lessors that that portion of the deed which contains the recitals, or, in other words, a statement of those considerations which led to its execution, conclude the grantors and all in privity with them as to the fraudulent intent with which it was executed. These recitals are as follows: "Whereas the said David Webb and Abraham Shoe-"maker are largely indebted to sundry persons, and it is "believed that their property would fall far short of satisfying "their debts, if collections were sought to be enforced by the "summary and usual process of law, and whereas there are "now heavy liens resting upon their estate, the younger class "of which, by due course of law would most likely be defeated "by the older liens absorbing the estate; and whereas David "Jennings and Stephen Taylor have become replevin bail for "said David Webb and Abraham Shoemaker upon a heavy "amount of judgments rendered againt them in the Circuit "Court of the county of Tippecanoe, at the October term "thereof, 1837, which judgments are yet mostly outstanding "and unpaid; and whereas to effect payment of the judg-"ments last aforesaid, and some older and other liens resting "upon the lands of said Webb and Shoemaker, the said David "Jennings and Stephen Taylor have placed for discount, in "the Branch at Lafayette of the State Bank of Indiana, their "negotiable promissory note for nine thousand dollars, with "Matthew H. Winton, James Davis and others, their indorsers "thereon, the proceeds of which note to be discounted for "them by said Bank are to be applied to the payment of the "said last mentioned judgments, and some other liens against "said Webb and Shoemaker's lands; * * * * and "whereas an advantage would arise to the creditors of said "Webb and Shoemaker by placing in the hands of a trustee "for disposition, as well the property of said parties subject to "execution as choses in action not subject to execution, thereby "enlarging the fund subject at law to the payment of those "debts, and avoiding the sacrifice of a sheriff's sale as well as

"a mutual advantage to said Webb and Shoemaker from the "prospect of realizing a greater sum of money from their "property, and discharging a greater portion and as they hope "all their debts. Now therefore, &c."

That part of the recitals, expressive of the opinion of the assignors that the execution of the trust deed, assigning their choses in action, and placing them in the hands of a trustee for the benefit of their creditors would avoid the sacrifice of a sheriff's sale, greatly advantage their creditors, and ultimately insure full payment of all their claims, the lessors insist, render the deed absolutely fraudulent, as a conclusion of law which can not be controverted. To sustain this anomalous position the lessors rely upon Ward et. al. vs. Trotter et. al. 3 Monroe 1. The authority of this case, and its applicability to the one under consideration are denied. The case does not seem to have been well considered by either court or counsel. The counsel for the plaintiff filed a petition for re-hearing which betrays more asperity of temper than legal research or cogency of logic. The facts of that case were these: On the 31st August 1818 one Kelly executed to Ward, in consideration of the sum of one dollar and the trusts therein expressed, a deed for certain real estate. The deed of assignment contained this clause: "and being in embarrassed circumstances and without "money to meet his debts, makes this transfer to prevent a "sacrifice of his property, which he deems ample to pay his "debts. If therefore the said James Kelly shall pay and "satisfy the claims specified in this deed, as well as other just "debts now due against him, and *others hereafter coming due* "*within one year from the date hereof*, then this deed to be void. "If the said Kelly shall fail to pay his debts within that time "then the said Ward shall sell, and apply the proceeds to the "payment of Kelly's debts, *giving preference to those specially* "*enumerated.*" The case was tried in the Circuit Court by the chancellor, without the intervention of a jury, who rendered a decree annulling the deed as fraudulent, from which decree an appeal was taken to the Court of Appeals. "There were "no depositions taken in the cause, and the question whether "the deed of trust was fraudulent or not, depended upon the

"evidence arising out of the circumstances of Kelly, and the "face of the deed itself." In the opinion delivered in the Court of Appeals the following language is used: "How were "Kelly's creditors to sacrifice his property. They could only "do so by having it sold under execution, and *this it was lawful "for them to do.* The deed must therefore have been made, "according to the repeated avowals of Kelly on its face, with "the intent to prevent or hinder his creditors from effectively "using the lawful means of obtaining the payment of their "debts. Such an intent is dishonest and unlawful, and a con-"veyance made with that intent or purpose is forbidden by "the statute against frauds and perjuries and declared to be "void as to creditors and purchasers."

The reasoning of the Court of Appeals applies with as much force to every deed of trust as to the one upon which it was adjudicating. It is the necessary effect of every deed of trust not only to hinder, but to absolutely preclude, the creditors of the assignors from coercing the payment of their debts by the ordinary process of execution out of the property assigned. The assignee takes the property assigned as free from subsequent judgments and executions against the assignor as though he owned it in his own right. So long as he properly administers the trusts conferred, no legal process, except by virtue of a lien antecedent to the deed of assignment, can be levied upon the property assigned. The trustee is answerable only to the courts of justice which may restrain any abuse of his powers, enforce their due execution, and, if necessary, remove him and appoint another trustee in his stead. Every person must be presumed to intend that which is the necessary consequence of his act. What injury can flow from declaring upon the face of an instrument as a motive, that which is the necessary consequence, and even the primary object, of its execution? No deed of assignment, in trust for creditors, ever was, or from the very nature of the thing ever can be, executed in the absence of an intention in the assignor to withdraw the property assigned from the jurisdiction of ordinary legal process. It is the absolute right of every debtor, independent of the assent of his creditors, to have his

property sold and the proceeds applied in payment of his debts through the medium of ordinary legal process, or by a competent trustee of his own appointment, as he may elect.

The Court of Appeals in the above case assume that every conveyance made by a failing debtor, however "bona fide" and equitable, which may have a tendency to hinder or delay creditors in the collection of their debts, is forbidden by the statute against fraud and perjuries, and therefore void. This ruling is not in accordance with the weight of authority.

In the case of Meux et. al. vs. Howell et. al., below cited, Ellenborough C. J. says: "It is not every feoffment, judg-"ment, &c., which will have the effect of delaying or hinder-"ing creditors of their debts, &c., that is therefore fraudulent "within the statute; for such is the effect *pro tanto* of every "assignment that can be made by one who has creditors: "every assignment of a man's property, however good and "honest the consideration, must diminish the fund out of which "satisfaction is to be made to his creditors. The feoffment "judgment, &c., must be *be devised of malice, fraud, and the* "*like*, to bring it within the statute. * * * * * * "The act of Parliament was meant to prevent deeds *fraudu-*"*lent in their concoction*, and not merely such as might *in their* "*effect, delay or hinder other creditors.*"

Every deed of assignment, which provides for the equitable distribution of the assets of an insolvent debtor among his creditors necessarily hinders and delays those creditors who are adherents to the maxim "*vigilantibus non dormientibus leges* "*subveniunt*," and generally secure a preference to themselves over their co-creditors by anticipating them in a resort to their legal remedies. But notwithstanding that such is the necessary effect of trust deeds, the right of the debtor to anticipate the legal action of his creditors by placing his assets in the hands of a trustee, to be disposed of for their benefit, providing his deed of assignment be equitable and just in its provisions, is sanctioned by our laws, and has received the commendation and advocacy of their most enlightened exponents. Brown vs. Minturn, 2 Gallison, 557. Halsey vs. Whitney, 4 Mason, 406. Nichol vs Mumford, 4 Johnson Ch. 522. Brash-

car vs. West, 7 Peters, 608. Robins vs. Embry, 1 Sm. and Marsh, 207.

Two prominent motives may be presumed to influence failing debtors to execute deeds of assignment, withdrawing their property from the jurisdiction of ordinary legal process, viz: to secure their rateable distribution among their creditors, and to realize from them, for their benefit, a larger amount than than they otherwise would. If the deed of trust imposes on the creditors no unnecessary or unreasonable delay, and is otherwise unexceptionable, I cannot imagine why the presence in it of a declaration of either or both of these motives should render it invalid. The question, how far is the right of the creditor to have the property of his debtor sacrificed, which is referred to in the above cited case from 3 Monroe, will be noticed in this brief under another head.

Recitals in a deed never operate as estoppels in favor of strangers to it. "Admissions in a deed as between parties and "privies are generally conclusive. But when offered in evi- "dence by a stranger, the adverse party is not estopped, but "may repel their effect in the same manner as though they "were only parol admissions." 1 Greenleaf's Evidene, Sec. 211. The cases cited by the author, Bowman vs. Rostron, 2 Ad. & Ellis, 295, and Mayor of Crlisle vs. Blamire, 8 East, 487 fully sustaiu the text. The same author in Sec. 204 of the same volume says: "estoppels bind only parties and privies, "and not strangers. Hence it follows, that though a stranger "may often show matters in evidence, which parties or privies "might have pleaded specially by way of estoppel, yet, in his "case, it is only a matter of *evidence to be considered by the jury.*" Hean vs. Rogers, 9 Barnwell & Cresswell, 577 snstains the same doctrine.

Even as between parties and privies recitals in a deed are not conclusive, unless they form a part of the undertaking of the grantor, or another, acting upon the faith of such recitals, has been induced to alter his condition. The reason given for the rule is that such recitals being collateral to the principal thing and forming no part of the contract between the parties, is not supposed to have received their deliberate attention. 1

Greenleaf on Ev. Sec. 26. This subject is discussed by Cowen J. in McRea vs. Purmont, 16 Wendell, 461. The question in contestation in that case was, whether a grantor, or one claimant under him, could controvert the consideration stated in a deed for its execution. In that case, at page 473, the following language is used: "Wherever a right is vested, or created, "or extinguished, by contract or otherwise, and writing is "employed for that purpose, parol testimony is inadmissible "to alter or contradict the legal and common-sense construc- "tion of the instrument; but a writing which neither by con- "tract or the operation of law vests, passes or extinguishes "any right *is susceptible of explanation by extrinsic facts.*" * * " * A deed is not conclusive evidence of every thing which "it may contain. The acknowledgment in a deed that the "consideration has been received is not conclusive of the fact. "*This is but a fact.* It may be explained or contradicted." Miller vs. Bagwell, 3 McCord, 429, is to the same effect. If a grantor can controvert the moneyed consideration stated in his deed, clearly he may put in issue the expressed motives for its execution which it may contain. That the recitals, out of which the question in this case arises, ever underwent the consideration or received the deliberate sanction of the grantors, is a rash and dangerous presumption. It is more likely that they were incorporated in the deed at the exclusive instance of the attorney who drafted it, and received only the passive assent of the grantors. The court therefore, so far as this question is concerned, instead of striking the deed from the evidence in the case, should have instructed the jury that in passing upon the question whether the deed, in its concoction, was intended to hinder and delay creditors, its recitals should be considered in connection with the extrinsic facts proved.

The case from 3 Monroe fairly considered does not establish a contrary rule. In that case the deed of trust provided for unjust preferences—that the property conveyed should not be sold in less than one year, and that during that year the grantor should have the exclusive use and occupancy of it. The case only proves that the court of appeals from those facts, taken

in connection with the recitals, arrived at the conclusion that the deed was executed in bad faith. No distinct legal question is discussed or determined in the opinion given.

There is, also, another answer to the objection, based on the recitals which the lessors urge against the validity of the trust deed. Recitals in a deed, when used as admissions and not as estoppels, must be taken together. 1 Cowen & Hill's, Philips Ev. 3 ed. 340. 4 do. 453, note 251 to p. 241. The authors cite Hoyatt vs. Phifer 4 Dev. Rep. 274. The lessors argue that the recitals disclose that the grantors executed the trust deed with the intent to prevent the sale and sacrifice of their property on execution, and that it is therefore void. Assuming the rule above stated in regard to recitals to be true, and under its guidance, I propose to briefly pursue this "shadow without substance." When the deed of trust was executed there existed incumbrances upon the property assigned to the amount of near sixteen thousand dollars, ten thousand four hundred and thirty dollars of which consisted of judgments rendered in the Tippecanoe Circuit Court and upon which executions were then in the hands of the Sheriff. In all that is said, expressive of fears of a sacrifice of property on execution, exclusive reference was had to those judgments and the incumbrances antecedent to them. It is expressly stated in the commencement of the recitals, "that there were then heavy liens resting upon the "estate of the grantors, *the younger class of which would most "likely be defeated by the older ones absorbing the estate.*" The debt of the lessors had not then been reduced to judgment and of course no reference could have been had to it. The recitals then set forth the scheme which had been devised to pay the incumbrances then existing, except the April judgments, and conclude, by an expression of the opinion of the grantors, that the same, if effected, together with their choses in action, which they were about to assign, would greatly advantage their creditors, avoid the sacrifice of a sheriff's sale, *and in the end secure the payment of all their debts.* The expression "avoid the sacrifice of a sheriff's sale" has exclusive reference to the one then impending, by authority of the executions on the judgments rendered in the Tippecanoe Circuit

Court, then in the hands of the sheriff. The creditors, representing these executions, consented to the execution of the trust deed, and thereby became parties to it. Their consent was superinduced by no fraudulent device, and the deed can not be said to be fraudulent as to them. The creditors, representing the October judgments consented because it secured their immediate payment; those representing the April judgments, because it presented the only contingency upon which they could hope to realize theirs. All the parties interested in the contemplated sheriff's sale, which it was feared would result in a sacrifice of the property of the grantors, consented to the transaction out of which this litigation arises. It is no where declared in the recitals that it was the purpose of the assignment to prevent a sacrifice of the property assigned by a sheriff's sale. The prominent motive is clearly stated: to prevent the exhaustion of the estate of the grantors by the older liens, to the entire exclusion of those creditors having younger liens, or none at all. This purpose was effected with the consent of those adverse to whom it was entertained. The expression "avoid the sacrifice of a sheriff's sale" is not stated as a motive, but parenthetically, as an incident of the execution of the deed. The expression is used by the grantors, in a congratulatory spirit to themselves, upon the good results which were likely to flow from the act of justice and wisdom they were about to perform. So far from wishing to evade the payment of the lessors they irrevocably pledged to the redemption of their claim, by a process which the law authorized them to adopt, their property subject and that not subject, to execution. The rights of the lessors seem to have been the objects of their earnest solicitude. So far as the question now under consideration is concerned there never was a less plausible pretence presented to screen from the scrutinizing gaze of a court a wicked and corrupt claim.

2. The lessors also insist that the deed of trust is void by reason of the following clause embraced in it, viz: "He (the "trustee) may allow the said parties of the first part (the "assignors) to continue in his name and for his use as such "trustee in the distillery business on that portion of the

"premises (assigned) now used for that purpose, and allow "them to enjoy such possession of said premises and personal "property as may be necessary and convenient for conducting "such business and the business of "*fatting*" hogs or the like, "which usually is connected with distilling, *allowing them such "reasonable compensation for their services* as may be necessary "for their comfortable sustenance, but having at all times the "control and ownership as such trustee of said business and "the property employed therein, with the right to take imme- "diate possession thereof at any time when he may think "proper to do so." The assignors by the above provision in the trust deed, authorized the trustee to employ them in closing up a certain distillery business in which they were then engaged, and with which they alone were conversant, "allow- "ing them such reasonable compensation for their services as "might be necessary for their comfortable subsistence." Two restrictions are laid upon the trustee in the allowances contemplated by the above recited provision of the trust deed: they were to be reasonable, i. e. commensurate with the services performed, and not to exceed what might be necessary to the comfortable subsistence of the assignors. Moreover, the employment of the assignors is not prescribed as a condition of the deed, but is submitted to the discretion of the trustee, who, as the record discloses, did not exercise that discretion in their favor. This question is too clearly against the lessors to merit elaborate argument. Mr. Burrill in his work on assignments, at page 173, says: "clauses in assignments, "giving the trustees power to employ debtors, if they think "proper, as agents or managers of the property for a limited "time and in subordination to the objects of the assignment "have been held valid." The author cites Coates vs Williams, 9 Eng. Law and Eq. Rep. 481, and James vs Whitbread, 5 Ib. 131. These cases I have examined, and they fully sustain the text. In the former case it is said by the Court, that "*the "ordinary printed forms of deeds of assignment to be had at any "Law Stationers in London contain such a provision.*" Regarding this question as clearly against the lessors, I have not

examined the numerous other cases bearing upon it, to which I have references.

3. The lessors also insist that the presence in the trust deed of the following clause, viz: "He (the trustee) shall have power "to rent, lease and hire the said real estate from time to time, "but no lease-hold term, to exceed three years," renders it absolutely void.

To sustain this position the lessors relied upon Rogers et al, vs DeForest et al, 7 Paige, 272. The case does not aid them. The opinion turns, exclusively, upon the construction given to the New York Statute governing "uses and trusts." The Chancellor, in his opinion, expressly admits that at Com. Law a power to mortgage and lease could be conferred, and that a power to sell would include them. It seems from the opinion given in the case that the 45th Sec. of that act abolished "uses and trusts" except as therein expressly allowed, and that the 55th Sec. of the same act limited the power of insolvent debtors to confer authority upon their assignees to dispose of the property assigned to an absolute sale thereof. When the trust deed, the validity of which is in contestation in this case, was executed, no such Statute existed in Indiana, and this question must be determined according to the principles of the Common Law applicable to it. The case of Rogers vs DeForest, however, was reversed in the Court of Errors—Darling et al. vs Rogers et al., 22 Wend. 483. Cowen, J. in his opinion in the latter case admits the correctness of the construction given by the Chancelor to the New York Statute of "uses and trusts," but insists that the presence in the assignment of a provision conferring the power to lease and mortgage only rendered the instrument void "*pro tanto*," leaving the same as to all its legal provisions valid, and so the Court ruled.

There is another obvious answer to this objection urged against the validity of the trust deed. The provision now under consideration, does not confer authority on the assignee to lease for any determinate period. The expression "but no "lease-hold term to exceed three years," can not fairly be construed to confer authority to create a lease-hold estate for that term, but, simply, as restrictive of a supposed incidental right

to the power to sell. Language, so entirely restrictive of supposed incidental powers, can not, by any fair rule of construction, be considered as creating them. The provision only amounts to the conference of a power to lease, in accordance with the legal rights of the assignee to do so. Notwithstanding the fierce discussions which have lately transpired in New York upon this and kindred questions, it is conceded there that an assignment conferring authority to the assignee to sell upon such terms, &c., as to the assignee may seem most expedient, is not objectionable for the reason that the presumption is that the assignor did not intend to authorize his assignee to act in contravention of law. This line of decision in New York is in entire accordance with the maxim that every instrument should, if possible, be construed "*ut res magis valeat "quam pereat.*"

The Chancelor in the case from 7 Paige, says: "upon the "whole, therefore, I am satisfied it was never the intention of "the Legislature to vest the legal estate in the trustee, under "the first subdivision of the 55th Section, for any other pur-"pose than that of an immediate sale for the benefit of cred-"itors; which estate would necessarily carry with it, as an "incident to the estate *the power to receive the rents and profits* "*until such time as the trust could be executed.*"

4. The fourth and last provision of the deed to which the lessors object reads as follows, viz: "provided, however, that "he (the trustee) shall not make sale of any part of the real "estate hereby conveyed within the period of eighteen months "from this date, *unless a fair price can within that time be pro-"cured therefor*, and at any time when he shall make sale of "any part thereof, he shall not in such contract of sale allow "a longer credit than five years upon any part of the purchase "money." Whether a provision in a deed of assignment, permitting the assignee to sell on credit, "*ipso facto,*" avoids the deed has been, and still is, a fruitful theme of discussion with the Courts of New York. On the one hand it is contended by the jurists of that State that the words "hinder "and delay," as used in the Statute of frauds must be literally interpreted, and on the other, that such was not the design of

that Statute, as such a construction would subvert every sale and conveyance made by a debtor to his creditors or to an innocent purchaser—that the purpose of the Statute was to prevent sales and conveyances fraudulent in their concoction, and not those which, though conceived in good faith, might in their effect have a tendency to delay or hinder creditors.

This question seems to have been first mooted in the Courts of New York in the case of Rogers vs DeForest above cited from 7 Paige. It arose upon an application to the Chancellor to appoint a receiver, in a case where an injunction had been granted against the assignee of an insolvent debtor, restrainin him from disposing of the property assigned. The deed of trust in that case expressly authorized the assignee to sell on credit, and that was urged as an objection to its validity. The Chancellor speaking of this question, says: "The express "power to sell on credit is a power which is usually implied "in trusts of this description, and it is not a violation of the "provisions of the Revised Statutes relative to uses and trusts. "Neither does the creation of such a trust, tend, in any man- "ner, to delay or hinder the creditors of the assignors in the "collection of their debts. For if the assignees do their duty, "they will not sell the property on credit without obtaining "therefore the difference in value, between a sale for cash, and "and a sale upon credit." The opinion of the Chancellor, however, was adverse to the validity of the trust deed on another ground, which is noticed above.

The case was taken by appeal to the Court of Errors, and the decree of the Chancellor, adjudging the trust deed void was by the unanimous voice of that Court, reversed—22 Wend 481. In the discussions had in the Court of Errors relative to the case, neither the counsel adverse to the validity of the deed, or Cowen, J., who delivered the opinion, made any mention of the question now under consideration. As late as 1839, therefore, the Courts of New York seem to have entertained no doubt of the propriety of a provision in a trust deed expressly authorizing the trustee to sell on credit. The decision in Darling, et al vs Rogers et al was acquiesced in, and regarded as the law of New York, until 1849, when the

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novel and mischievous heresy which I am combatting was galvanized into life again by an obiter dictum of Bronson, J., in Griffin vs Barney, 2 Comstock, 365. In 1850 the case of Nicholson vs Leavitt, 4 Sandford S. C. 252, was decided in the Superior Court of New York, in which the Court in a long and elaborate opinion, ruled contrary to the dictum of Bronson, J., in Griffin vs Barney. The attention of the Supreme Court to the powerful and convincing opinion of Duer, J., in the last cited case, is respectfully solicited. In Burdick vs Post, 12 Barbour, 168, decided in 1851, the Supreme Court of New York held that the presence in a trust deed of a power to sell on credit rendered it void. In this case the Court divided, and an elaborate dissenting opinion was read, which is contained in the report of the case. In 1851 the Court of Appeals reversed the judgment of the Superior Court in the case of Nicholson vs Leavitt, and held that the provision in the deed of assignment, authorizing the assignee to sell on credit avoided it, and it is therefore admitted that such is the present law of New York, as pronounced by the highest Court of judicature in that State. Several considerations readily suggest themselves, which greatly lessen, if they do not wholly destroy, the weight of the final decision of the Court of Appeals as authority in this case. The conflict of opinion between the Superior Courts of that State, and Judges of the same Court which preceded its announcement and attended the discussion of the question—the fact that it stands opposed to the previous decisions of the Courts of the same State, and to the universal acceptation of the bar and bench of England as to the law governing the question, all conspire to brand the decision of the Court of Appeals as a reckless innovation upon a principle of law theretofore well settled,—as amounting to sheer judicial legislation. Moreover, the decision turns upon a literal interpretation of the New York Statute of frauds, which is materially different from that of Indiana in force when the deed of trust, the validity of which is in dispute, was executed.

We borrowed the Section of the Statute of frauds, a construction of which is involved in this case, from England, and it is but fair to presume that the Legislature adopted it with

reference to the judicial expositions which it had received from the Courts of that country. The Courts there, as will be seen in the sequel of this brief, have uniformly held that to bring a case within that section of the Statute, the existence of guileful intent—*moral fraud*—is essential. The vexed question which has so much harassed the Courts of New York, has never been the subject matter of serious discussion there.

Janes vs Whitbread and others, 5 Eng. Law, and Eq. Rep. 431, which was a feigned issue directed out of Chancery to determine whether or not a certain deed of assignment had been executed in good faith, clearly enough discloses what is the received opinion of the profession in England upon this subject. The deed of trust in that case, in the habendum, contained this provision: "upon trust to collect and receive the "debts and dispose of the assigned premises, and every part "thereof, either by public sale or by private contract, and in "one or more lot or lots, *with liberty to give any credit for the* "*same*, or to take any security for the purchase money, or any "part thereof, as to the said trustee, his executors, or admin- "istrators, may seem proper." The jury returned a verdict that the deed had been executed in good faith,—and the Court overruled a motion to set the verdict aside. Jervis C. J. and Maule J. delivered opinions affirming the validity of the deed. What is singular is, that it did not occur in that case to either Court or counsel, that the provision in the trust deed above cited, affected its validity. No such position is taken by Chambers, Q. C., in argument. If it be true that it be law that the presence of such a provision in a trust deeds renders it void, it is singular that the Chancellor did not at once so rule, instead of directing an issue to be tried by a jury. The case proves that as late as 1851, it had never occurred to any English jurist that such a provision in a trust deed avoided it.

In the later case of Coates vs Williams, 9 Eng. Law and Eq. Rep. 481, the deed of trust, the validity of which was in contest, contained the same provision. The Court sustained it, and one of the Judges said that the deed was in the usual form of deeds of assignments to be had at any law stationers in London.

Neally vs Ambrose, 21 Pick, 185, was an application made under the trustee process of Mass. to charge the assignees on the ground that they had sold and disposed of the assets assigned, on credit. The Court delivered the following opinion: "This is a claim to charge trustees who took prop-"erty of the principal defendant under a common trust assign-"ment for creditors on the ground that they had no authority "to sell a stock of goods on credit, and having so done, they "are chargeable for so much in money. The Court are of "opinion that the assignees had authority to sell the goods on "credit, and in the absence of all proof of fraud, they are not "personally answerable for the same money." See also Hopkins et al. vs Ray, et al, 1 Met. 78. These cases assume that as an incident of his trust the assignee of an insolvent debtor has the right to sell on credit, without an express grant of such authority. Certainly there can be no fraud in expressiy conferring upon assignees those powers, which the law gives them as incidents of their trust. Such is the condition of the authorities upon this subject. In England the printed forms in general use, of instruments of assignment contain a clause authorizing a sale on credit, and there they have been uniformly sustained, and never even controverted. In Massachusetts the power to sell on credit is treated as a necessary incident to the trust. In New York the same doctrine has prevailed until within the last six years, *a period whereof the memory of man doth run to the contrary.*

A strong argument against the construction which the lessors give to the Statute of frauds in force when the deed of trust was executed, may be drawn from the co-temporaneous legislation of this State, and the uniform practice of Courts of Chancery in England and America where similar Statutes existed. It has been the custom of those Courts in winding up insolvent partnerships for the benefit of creditors, to direct receivers to sell on credit, and the commissioners of bankrupts in England usually sell the assets of a bankrupt on credit. The same code in which the Statute under consideration is to be found, also contains Statutes allowing a judgment debtor six months stay of execution, and directing administrators, in

making sale of the assets in their hands, as such, to give credit. This custom of Courts, and this course of co-temporaneous legislation strongly illustrates that, in the opinion of the law-givers who enacted the Statute, and the Courts, whose province it was, to interpret it, the hindrance and delay of creditors, necessary to avoid a deed, must be guileful and corrupt. This view of the question is strongly pressed by Duer, J., in his opinion in the case of Nicholson vs Leavett.

But there is another answer to the objections taken to the clause in the deed of assignment now under consideration. That clause contains two provisions: 1st. That no part of the real estate thereby conveyed, should be sold within less than eighteen months from the date of the deed. 2nd. That upon making sale of any part of the property assigned, a longer credit than five years should not be allowed. As to the second provision it is exclusively restrictive. It professes, not to confer any authority, but to restrict the exercise of that authority which the Courts of England and Massachusetts have treated as legal incidents to the trust, conferred by the deed, of which it is a part. The observations made in relation to the clause restricting the authority to lease, are applicable here.

The first provision of the clause declares that no part of the real estate thereby conveyed, should be sold within less than geihteen months from tho date of the deed, "*unless a 'fair' "price could within that time be obtained therefor.*" The authority to dictate what should be regarded as a fair price, is not reserved to the grantors, but committed to the judgment and discretion of the assignee. The provision simply amounts to an injunction upon the assignee, in making sales of property assigned, to act as a prudent man, similarly situated, naturally would. Its object was to prevent that wanton and reckless sacrifice of the property assigned, that would have been equally prejudicial to the assignors, and their creditors, which characterizes the sale under which the lessors in this case claim. The clause should be construed favorably to the assignors, for it is not to be presumed that they intended fraud if the deed of trust, and the circumstances which attended its execution,

are consistent with a different hypothesis. It is a rule of great universality that a deed should be interpreted, if it fairly can, "*ut res magis valeat quam pereat.*" If the provision imposes an obligation upon the trustee which, in its absence, it would have been his duty to observe, it cannot avoid the deed. The lessors in pressing this point, assume that it is the duty of the assignee, if necessary to accelerate the execution of his trust, to recklessly sacrifice the property committed to his care. That this assumption is a false one, may be abundantly illustrated by analogies drawn from the Com. Law rules relative to the duties of Sheriffs, and other executive officers of Courts, in the sale of property upon legal process. At Com. Law it was not only the right, but the duty of a Sheriff, where he could not procure a bid for property exposed by him to sale, approaching its real value, to return the execution, no sale for want of bidders. It is true that sales upon bids, that were merely nominal, have been sustained, but whether it was the duty of the Sheriffs to make such sales is quite a different question.

In 3 Campb. Rep. 521, it is said a sheriff having levied on property is not *justified* in selling to the highest bidder greatly under value. In 2 Cowen 139, and 2 Paine and Duer 338, it is said that an officer, when he sees that there must be a great sacrifice of property, is bound to pastpone the sale. I cite these cases from Allen on Sheriffs, pp. 171, 2. The various Appraisement Laws enacted in Indiana, are merely declaratory of the Com. law, and were rendered necessary by the habitual neglect, by Sheriffs, of their Com. Law duties. The assignors then, in providing that their property should be sold for its fair value, encroached upon no legal rights of the lessors. Deeds of assignment, absolutely forbidding a sale of the property assigned for a longer period than eighteen months have been upheld. Harvey vs Skinner, 9 Iredell's Law Reps. 191. Robins vs. Embry, 1 Smedes and Marsh, Ch. 207.

The case of Henderson vs Bliss 8 Ind. 100, is cited by the lessors of the plaintiff with great confidence. We ask the Court to look at that carefully, believing that an examination of the halting and unsatisfactory opinion of the Judge who declined

to review the authorities will have but little weight here. Indeed it may well be doubted whether the Supreme Court of Indiana regard the case as authority at all. When the trust deed now under consideration was before that Court in Jenners vs. Doe, 9 Ind., 461, the same Judge who had pronounced the opinion in Henderson vs. Bliss, cited it to show that in his opinion this deed was void, but he took good care to say at the close of the discussion of the deed of trust "but thus far "we have repressed our own opinion *not that of the Court.*" See also McFarland vs. Birdsall, 14 Ind., 126; N. A. & S. R. R. Co. vs. Huff, 19 Ind., 444.

It is not necessary here, to examine the doctrine of constructive frauds or to define its limits. It will suffice to prove that it has no application to this case,—that the lessors cannot avoid the deed, for the causes assigned, in the absence of proof of moral corruption, which is always a question of fact for the consideration of the jury. A reference to the Statute, the construction of which this question involves, will aid this investigation. It is found in the Rev. Code of 1838, p. 225, Sec. 9, in the act defining crimes and prescribing their punishment, and not in the general act to prevent frauds and perjuries. It reads as follows: "That every person who shall be a party to "the sale and delivery of any goods, &c., or conveyance of any "estate or interest in lands, &c., made or executed with a view "to hinder, delay, or defraud creditors, and every person being "privy to or knowing of such sale, conveyance or assignment, "who shall willingly put the same in use, &c., shall upon con-"viction be imprisoned in the county jail not exceeding twelve "months and be fined any sum not exceeding two hundred "dollars, and all such sales, deeds, conveyances and assign-"shall be absolutely void."

The same language that pronounces the sale, assignment or deed void, denounces the penalties of fine and imprisonment against all who participated in its execution. The penalties of the Statute sufficiently indicate that it aimed at moral fraud. I am not without high authority that its severe penal features should have a controling influence over the question under consideration. In Meux, et al. vs. Howell, et al., 4 East 1,

which was a *qui tam* action based on the 5 Sec. of the Statute of 13 Elizabeth, Ellenborough, C. J., says: "It is not every "feoffment, judgment, &c., which will have the effect of delay- "ing or hindering creditors of their debts, &c., that is there- "fore fraudulent within the Statute; for such is the effect, *pro* "*tanto*, of every assignment that can be made by one who has "creditors. * * * But the feoffment, judgment, &c., "must be devised of malice, fraud, or the like, to bring it "within the Statute." Grose, J., also delivered an opinion in the case, in which he treated the penal features of the Statute, upon which the action was based, as definitive of the question that moral fraud was essential to sustain it. The ruling in this case has been steadily adhered to in England. Pickstock vs. Lyster, 3 Maule and Sel. 371. In the above cited case of Janes vs. Whitbread, the only objection urged against its validity appeared upon the face of the instrument of assignment—and yet the Chancellor, although the practice and usage of his Court were to try questions of fact without the intervention of a jury, directed a feigned issue to obtain the opinion of a jury as to whether the deed was fraudulent or not—thereby clearly evincing that he regarded it as a question of moral fraud. The Section in the present Rev. Code of New York, declaring assignments made with the intent to hinder and delay creditors, void, which was in force when the transactions out of which the litigation in Nicholson vs. Leavett arose, is incorporated in the general act against frauds and perjuries, and prescribes no penalties for a violation of it. There is a sufficient answer to that case. The opinion of Grose, J., in Meux vs. Howell, turned mainly upon the severe penal features of the English Statute. The Section of the Statute of frauds, of New York, under which the decisions in Rogers vs. Darlington (above cited) and Wilder, et al. vs. Winnie, et al., 4 Wend. 100, 6 Cowen 284, were made, prescribed severe penalties for a violation of it—and this may account for the conflict between those cases and the case of Nicholson vs. Leavett. In the case above cited from 4 Wend, and 6 Cowen, the opinion of Grose, J., in Meux vs. Howell, is fully sustained. In the case of Hendricks vs. Robinson,

2 John. Ch. R. 306-7-8, Chancellor Kent after indorsing the opinion of Ellenborough, C. J., in Meux vs. Howell, says: "Nor is an assignment, if honestly made, bad, though made "to secure against *future* as well as present responsibilities. "It is altogether a question of *present intention, and, if that be "free from fraud*, the assignment is not void within the "Statute." The section of the Statute of frauds, in force in New York when this decision was made, was, in its principal features, a transcript of the English Statute. In Hardy vs. Skinner, 9 Iredell's Law Reps. 191, this question was presented in a very tangible shape, and as distinctly decided. In that case the deed of assignment contained a stipulation that a sale of the property assigned, should not take place in less than three years, and that during the intermediate time the assignor should retain the possession and use of the property assigned. The case was submitted without any evidence except the deed of assignment, and the admission of the complaining creditor that there was no moral fraud. The Court ruled that the deed of assignment could not be regarded as fraudulent in law, upon its face. See, also, Hafner vs. Irwin, 1 Iredell's Law Reps. 490.

The lessors cite cases from New York, proving that the reservation of a pecuniary benefit, out of the property assigned, to the assignor, or of the power to revoke, or to give future preferences, or giving the preference to such creditors as will consent to take their shares in full of their debts, avoids the assignment. These cases, generally, when examined, are found to turn upon the question that such contracts are forbidden by the New York Statute of "uses and trusts." Contracts forbidden by the law are said to be constructively fraudulent and void. These authorities have no application, and besides, there are numerous and very high authorities to the contrary. An assignment, which in its tendency hinders and delays creditors, is not forbidden by Com. law, or the provision in the Code of 1838, above cited; for such is the effect of every conveyance by one having creditors. The Statute, as did the Com. law, forbids the making of such an assignment with a covinous and guileful purpose. We can

see no reason why the court should depart from the path of judicial decision upon this subject universally pursued in England and America until the decision of Nicholson vs. Leavett. In the decision of this case, the late New York cases can not be regarded as safe guides. Scarcely a trace of the intricate and complicated New York State of "uses and trusts," which seem to have influenced the rulings in those cases, can be found in the Indiana Rev. Code of 1838. The legislation of Indiana and New York upon kindred subjects are entirely dissimilar.

We cite the case of Conkling vs Coonrod, 6 Ohio State Rep. 612, as strongly sustaining the deed in question. There the trustee was vested with the power to sell the property assigned, at public or private sale, for cash or upon credit, to barter or exchange it in his discretion and dispose of it as freely and lawfully as the assignor could, and yet the deed was sustained. The Court in pronouncing the judgment express their disapproval of the New York cases as not sustained by principle or authority and refer to the dissenting opinion of Brown, J. in Burdick vs Post, for reasons for their opinions. See also Floyd vs Smith, 9 Ohio State Rep. 546.

II. The same important inquiry arises upon the validity of the Marshal's deed to the lessors of the plaintiff.

The Supreme Court of Indiana in the case of Jennerr vs Doe, 9 Ind. 461, decided that the deed was void because the sale was not made in Tippecanoe County where the real estate is situate. The practice of the Marshals in making sales appears from the record not to have been uniform, some being made at Indianapolis, and others in the counties where the real estate was located. We insist that both modes could not have been legal. We apprehend that the practice of making sales at Indianapolis of lands in distant counties grow out of the *convenience* of the lawyers having "the most extensive practice," rather than from ony law authorizing it.

There was no law of Congress authorizing a Marshal to sell property on execution or regulating the mode in which he shall proceed, except the act of Congress of May 19, 1828. This act provides that "the forms of mesne process, except the style, and

"the forms and modes of proceeding in suits in the courts of "the United States, held in those States admitted to the Union "since the twenty ninth day of September seventeen hundred "and eighty nine, in those of Com. Law shall be the same in "each of said States respectively, as are now used in the high-"est court of original general jurisdiction of the same." The mode in which a Marshal shall conduct a sale and the preliminary steps which are incumbent on him to take, are regulated, solely, by the principles of the Com. law and the code of Indiana in force when the act of Congress was adopted. The code of Indiana then in force is silent as to the place where real estate shall be sold, but provides that a Sheriff, before offering property for sale on execution, shall give at least twenty days notice of the time and place of such sale, by advertising the same, in three of the most public places, by written advertisements, set up in the Township or Townships where such real estate is situated, *and also by advertising the same in the nearest weekly newspaper, for three weeks immediately preceeding such sale, if any such paper be printed in his county.* Rev. code 1824, p. 189 sec. 5. It was argued in the Circuit Court that the bailiwick of the Marshal, being co-extensive with the State, he could advertise and sell at any place within it. This cannot be the law. The object of the Statute is to compel the publication of the sale, and the sale itself, in the community where the property is located. For all practical purposes the sale in this case might as well have been advertised and made in the wilds of Siberia, or the deserts of Sahara as at Indianapolis. Laying the Statute aside, and testing this question by the Com. law—by those rules which grow out of the nature and fitness of things and commend themselves to our observance by their obvious propriety, and it is equally fatal to the title under which the lessors claim. At Com. law personal property could not be sold on execution unless the same was produced for the inspection of bidders present, 17 John. 116. There is an obvious propriety in compelling the sale, and advertisement thereof, of real estate, to be made in the vicinity in which it is located. Can it be said that a Marshal's sale of valuable real estate, at a mere nominal

price, held sixty miles from the locality in which the property is situated, and where it was advertised, if ever legally advertised at all, is valid.

We submit that the authorities cited by the plaintiff's attorneys, Messrs. Gregory & Jones, and we have not seen the brief of the other connsel, do not establish the proposition that the order of the Circuit Court approving the sale and directing the deed to be made is such an adjudication as will prevent the sale from being attacked collaterally. We understand the principle settled by those decisions to be the well settled one that when a Court has jurisdiction of the subject matter its judgment can not be impeached collaterally, because the facts do not appear upon which its action was based; those facts will be presumed, or, if they are shown and have been properly adjudicated upon and found sufficient by the Court, however erroneously, the judgment will stand unless reversed upon a direct proceeding for that purpose. But when it is shown *affirmatively* that the act was wholly unauthorized, the proceeding is a nullity and void. Cox vs Mathews, 17 Ind. 367.

All of which is respectfully submitted,

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LAFAYETTE JOURNAL COMPANY, PRINTERS.

Supreme Court of the United States.

JOHN DOE, *ex dem.* POMEROY, *et al.*
Pl't'ff in Error,
vs.
THE STATE BANK OF INDIANA,
Deft. in Error.

Statement and Points for Defendant in Error.

STATEMENT.

On the 10th of October, 1837, ten judgments were rendered against Webb & Shoemaker, merchants in Lafayette, Indiana, amounting to	$6,531 04
Before the 5th of November, 1838, eight more judgments were rendered against them for	5,527 83
There was also a mortgage on the lands of Webb, April 5, 1838, for	2,365 00
Total, ...	$14,423 87

(Record pp. 40, 41, 53.)

There were also six suits pending against them on the 5th of November, 1838, on which judgments were rendered two days afterward, for $2,505 46
(Record, pp. 41, 53.)

Webb had real estate worth $11,500, (Record, p. 55,) and he and Shoemaker, on the 5th of November, 1838, made an assignment of all their partnership property, including choses in action, and Webb conveyed his real estate in Tippecanoe County in trust to one Jenners, to pay the debts of the firm. Webb's wife also conveyed half a lot of her own to Jenners for the same purpose. (Record, pp. 45–53.)

When this trust deed was made executions were in the hands of the sheriff on all the judgments then rendered, amounting to over $12,000, besides interest and costs, and at least $500 more than the lands were worth, to say nothing of the mortgage of over $2,000, and other encumbrances. The trustee took immediate control of all the property, and sold it—the Bank purchasing the land—and paid off all the claims so far as the proceeds would go, and none of the proceeds ever were received by Webb & Shoemaker. (Record, p. 55.) The assignment and deed were assented to by all the creditors of Webb & Shoemaker, except the lessors of the plaintiff and the earliest creditors, whose judgments were paid by the trustee. (Record, p. 54.)

On the 19th of November, 1838, the lessors of the plaintiff recovered a judgment in the U. S. Circuit Court, Indiana, for $1,125 31, against Webb & Shoemaker, and all the lands in the trust deed were sold by the Marshal on execution to the plaintiff's lessors, at Indianapolis, Marion County, for $60, and a deed was made to them therefor. (Record, p. 11–13.)

The case was tried by the Court by agreement of parties, without the intervention of a jury. (Record pp. 5 and 6.)

POINTS.

The judgment must be affirmed, because there was no agreed statement of facts, nor was there any verdict of a jury. The trial by the Court under an agreement to waive a jury, and its finding, will not authorize this Court to revise the alleged errors in the record, and the judgment must be affirmed. This has been repeatedly decided, but I need only cite—

Kelsey vs. *Forsyth*, 21 Howard, 85.
Campbell vs. *Boyreau*, Id. 224.
Guild vs. *Frontin*, 18 Id. 135.
Suydam vs. *Williamson*, 20 Id. 428.

If this view is not sustained, I submit—

I. The trust deed was valid as an absolute assignment for the benefit of creditors.

1. There was no motive for Webb to make a conveyance of his land to defraud, hinder or delay his creditors, because they were already bound by judgments beyond their value, which the trust deed could not affect. *Hastings* vs. *Baldwin*, 17 Mass. 551.

2. The assignors voluntarily placed a large amount of choses in action in the hands of the trustee, which were not liable to execution, to enlarge the fund for the payment of their debts. This rebuts a fraudulent intent. *Stewart* vs. *English*, 6 Ind. 176. Such choses in action could not have been reached by the creditors, even by chancery proceedings in Indiana. *Shaw* vs. *Avaline*, 5 Ind. 380.

3. The conveyance by Webb and his wife of her individual property, to pay the firm debts, is strong evidence of good faith and a desire to pay rather than defraud creditors.

4. Webb & Shoemaker had a right to place their property in the hands of a trustee, to be equitably applied for the benefit of their creditors, though the effect of their assignment was to prevent a sacrifice of it by forced sales, and to some extent delay creditors.

Brown vs. *Minturn*, 2 Gallison 557.
Halsey vs. *Whitney*, 4 Mason 406.
Nichol vs. *Mumford*, 4 Johns, Ch. 552.
Brashear vs. *West*, 7 Peters 608.
Hoffman vs. *Mackall*, 5 Ohio St. 124.
Pickstock vs. *Lyster*, 3 M. & Selw. 371.
Church vs. *Drummond*, 7 Ind. 17.

5. The recitals in the deed of trust, relied upon as evidence of fraud by the grantors, do not create an estoppel in this case because it is used in evidence in a case between strangers to it. 1 Greenleaf Ev. §211. They are only matters to be considered by the jury, and do not make the deed void. Id. §204. *McRea* vs. *Purmont*, 16 Wend. 473.

6. The recitals of the deed when used as admissions must all be taken together, and thus taken they show no fraudulent intent. 1 Greenleaf's Ev. §201. *Hoyatt* vs. *Phifer*, 4 Dev. Rep. 274.

7. The power conferred upon the assignee to sell on credit does not render the assignment void on its face.

Burrill on Assignments, 210–16, 499.
Abercrombie vs. *Bradford*, 16 Ala. 560.

Dance vs. *Seaman*, 11 Grattan 778.
Grinnell vs. *Adams*, 11 Humphrey 85.
Neally vs. *Ambrose*, 21 Pick. 185.
Hopkins vs. *Ray*, 1 Met. 79.
Conkling vs. *Coonrod*, 6 Ohio St. 611.
Janes vs. *Whitbread*, 11 C. B. Rep. (73 Eng. Com. Law Rep. 406.)
Coates vs. *Williams*, 9 Eng. Law & Eq. Rep. 481.

The recent decisions of the courts of New York, cited by the plaintiffs in error, overruling the earlier cases in that State are not law in Indiana. The Supreme Court of the latter State refused to follow these decisions when this very deed was under consideration. *Jenners* vs. *Doe*, 9 Ind. 466. The present assignment law of Indiana expressly authorizes sales on credit. 1 Gav. & Hord's Stats. 116, §10. Executors and administrators have always been allowed to sell on credit in Indiana.

8. The clause prohibiting the trustee from selling within eighteen months, "*unless a fair price*" could be obtained therefor, does not vitiate the deed. It was directly calculated to benefit the lessors of the plaintiff in error, who were the junior encumbrancers. It is the duty of sheriffs and trustees to refuse to sell at grossly inadequate prices. Burrill on Assignments 200–1.
Benton vs. *Shreeve*, 4 Ind. 66. Allen on Shffs., 171–2.
Hardy vs. *Skinner*, 9 Iredell's Law Rep. 191.
Robins vs. *Embry*, 1 Smedes & M. Ch. 207.

It was the duty of the trustee to sell for a fair price, and this provision of the deed should be sustained in accordance with the maxim, "*ut res magis valeat quam pereat.*"

9. The authority to the assignee to allow the assignors to remain in possession of a part of the premises, and employ them to carry on the distillery business, allow-

ing them a reasonable compensation for their services, &c., does not vitiate the deed. This is expressly decided in Indiana.

New Albany & Salem R. R. Co. vs. *Huff*, 19 Ind. 446.
Coates vs. *Williams*, 9 Eng. L. & Eq. Rep. 481.
Janes vs. *Whitbread*, 11 C. B. Rep., (73 Eng. C. L. Rep. 406.)
Skipwiths Exrs. vs. *Cunningham*, 8 Leigh 271.
Baxter vs. *Wheeler*, 9 Pick. 21.
Kevan vs. *Branch*, 1 Grattan, 274.
Hardy vs. *Skinner*, 9 Iredell's Law Rep. 191.
Hafner vs. *Irwin*, 1 Id. 490.
Tompkins vs. *Wheeler*, 16 Peters, 106.

10. The authority to the assignee to lease the premises does not invalidate the deed. Burrill on Assignments, 222-3. The case of *Darling* vs. *Rogers*, 22 Wend., 483, turned upon the New York statute upon uses and trusts.

11. The Statute of Indiana in force when this deed was made, was a penal one, and is aimed at *moral* fraud, and must be strictly construed. R. S. Ind. 1838, 225 §9. *Meux* vs. *Howell*, 4 East, 1.

12. That all the creditors, except the lessors of the plaintiff, assented to this deed for the purposes of the trust, and to the terms in which it was drawn, is strong evidence of good faith.

13. The Statute of 1838, being similar in effect to 13 Elizabeth, c. 5, which was declaratory of the Common Law, should be construed in accordance with the de-

cisions of the English courts, which are regarded as the best authority in Indiana.

Stevenson vs. *Cloud*, 5 Blackf. 92.

McCord vs. *Ochiltree*, 8 Id. 15.

II. If it shall be held that the trust deed cannot be sustained as an absolute assignment for the benefit of creditors, it is valid as a *conveyance in the nature of a mortgage* upon the lands to raise money to pay off the oldest judgments.

1. The assignors conveyed their lands to the trustee as security for a loan of $9,000 borrowed from the Bank and applied to pay off the oldest executions. This was a mortgage with a power of sale which was acted upon. The particular form or words of the conveyance are unimportant. 2 Story's Eq., §1018. Burrill on Assignments, 31–6.

Wright vs. *Bundy*, 11 Ind. 398.

Hoffman vs. *Mackall*, 5 Ohio St. 125.

2. Even though the instrument would not be sustained to pass the legal title if the action were against the parties to the deed, still the Bank, having advanced her money to save the property, is entitled to the benefit of the security.

Valle vs. *Fleming*, 29 Miss. (8 Jones) 152.

3. As mortgagee, Jenners had become the legal owner of the premises. and entitled to their possession.

Doe vs. *Grimes*, 7 Blackf. 1.

4. As mortgagee in possession, Jenners had full power to convey the lands to the defendant in error.

Givan vs. *Doe*, 7 Blackf. 210.

5. The power of sale contained in the instrument was sufficient to authorize the trustee, Jenners, to pass a good title.

1 Hilliard on Mortgages 90–101, and numerous authorities cited in notes. 4 Kent, (9 Ed.) 163.

Richards vs. *Holmes*, 18 Howard 143.

III. The Marshal's sale, under which the lessors of the plaintiff claim title, being made in Marion County, of lands in Tippecanoe County, was void.

1. "Writs of execution and other final process issued on judgments and decrees rendered in any of the Courts of the United States, *and the proceedings thereupon shall be the same*, except their style, as are now used in the courts of such State." Act of May 19, 1828, 4 U. S. Stats. at Large, 281.

Ross vs. *Duval*, 13 Pet. 45.

United States vs. *Knight*, 14 Pet. 301.

Gwin vs. *Breedlove*, 2 Howard, 29.

2. Under this act, judgment creditors acquire a lien upon lands of persons who replevy executions, by signing bonds in the hands of the Marshal, throughout the State of Indiana.

Simpson vs. *Niles*, 1 Ind. 196.

3. Although the judgment of the U. S. Circuit Court in favor of the lessors of the plaintiff, and under which they claim title, was a lien upon all the lands of Webb throughout the State, still the sale on execution was void, because not made in Tippecanoe County, where the lands were located, as required by the Statute of Indiana on the subject of execution sales.

Jenners vs. *Doe ex. dem. Pomeroy*, 9 Ind. 461.

4. The decision of the Supreme Court of Indiana in the case of *Jenners* vs. *Doe, supra*, on a question of the interpretation of the State Statute concerning the very execution now under consideration, will be adopted by this Court, although to do so will require the reversal of the ruling below.

United States vs. *Morrison*, 4 Pet. 124.

See, also, *Beauregard* vs. *City of New Orleans*, 18 How ard 497.

5. "The construction given to a Statute of a State "by the highest judicial tribunal of such State is regarded "as a part of the Statute, and is as binding upon the "courts of the United States as the text."

Leffingwell vs. *Warren*, 2 Black, 599, 603.

6. When a State Statute prohibits the sale of a chose in action by the Sheriff on execution for less than two-thirds of its appraised value, and a Marshal sells such chose on process from the federal court without appraisement, the sale is void.

Collier vs. *Stanbrough*, 6 Howard, 16.

If the State can regulate the *mode* of sale, can it not the *place* of sale?

7. The record shows that there was no settled practice of the Circuit Court for the District of Indiana in relation to Marshal's sales, some being in the counties in various parts of the State where the lands were situate; others being in Marion county, of lands in other counties; and, in several cases, the returns were silent as to the place of sale. The practice of the Court, therefore, not being uniform, was never established, and can prove nothing. The maxim, *cursus curiæ est lex curiæ*, can not, therefore, apply.

8. The Marshal's sale in Marion County being void, its alleged approval by the Court on the petition of the purchasers for his successor in office to make a deed, which was *ex parte*, does not validate the sale.

Shriver's lessee vs. *Lynn*, 2 Howard, 43.

9. The cases of *Voorhees* vs. *Jackson*, 10 Peters, 449, *Lessee of Grignon* vs. *Astor*, 2 Howard. 319, &c., cited to show that the approval of the Marshal's sale, on such *ex parte* order, is such an adjudication that the sale can not be collaterally questioned, are not applicable. Those cases only recognize the well-settled doctrine, that, where a court has jurisdiction and adjudicate a question, the existence of all needful facts to confer such jurisdiction will he presumed to sustain the judgment, and their existence can not be denied. But where, as in this case, the facts showing that the act approved was void, appear affirmatively, such affirmance of the act gives it no legality.

Shriver's Lessee vs. *Lynn*, 2 Howard, 43.

Cox vs. *Matthews*, 17 Ind. 367.

H. W. CHASE,
Att'y for Deft. in Error.

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SUPREME COURT

OF THE UNITED STATES.

JOHN DOE, *ex dem* Lessee of POMEROY & WILSON et al.,

Plaintiffs in Error.

against

THE STATE BANK OF INDIANA et al.,

Defendants in Error.

Statement and Points for Plaintiffs in Error.

WM. C. TRAPHAGEN,

Attorney for Appellants and Plaintiffs in Error.

JAMES T. BRADY,

Of Counsel.

CHASE & WILSTACK,

Attornies for Deft. and Respt. in Error.

New York:

G. A. Whitehorne, Printer, 119 Fulton & 42 Ann Streets.

1864.

In the Supreme Court of the United States.

JOHN DOE, *ex dem* Lessee of POMEROY & WILSON et al., Plffs, in error,
against
The STATE BANK of INDIANA, et al,
Defts in error

STATEMENT AND POINTS FOR PLAINTIFFS IN ERROR.

This case comes before this Court on writ of Error to the Circuit Court of the U. S. for the district of Indiana, where judgment was rendered for the defendant in action of Ejectment for certain land in Lafayette, county of Tippecanoe in the State of Indiana.

The action was commenced on the 28th of April, 1849, the judgment entered at the November Term, 1858, Folio 10.

The lessor of the plaintiff in error and the defendant both claimed title under *David Webb*, the former under a deed from the U. S. Marshal, executed and delivered August 19, 1840, in pursuance of a sale on execution against Webb. The defendant claimed under a trust deed from Webb and Abraham Shoemaker to William M. Jenners, executed April 5th, 1838, before the judgment on which the aforesaid execution issued, Folio 32-34.

The process being served upon the persons in possession of the land, Fol. 5, such proceedings were had that the State Bank of Indiana was permitted to defend, and the proper consent being given, pleaded the general issue, Fol. 9, at the November Term, 1858; the issue was by consent

tried before the Court without a jury, and judgment given for the defendant as having the paramount and better title The plaintiff excepted, Fol. 10, moved for a new trial and filed reasons therefor. The motion was overruled. The court held on the argument of the Bill of Exceptions.

First.—That the Marshal's sale and conveyance were in all respects regular and valid.

Second.—That the trust deed was valid, and created a title older and better than that of the plaintiff.

There appear to be two bills of Exceptions in the record, a brief one at folio 11, and one beginning at folio 12, which sets out all the evidence and proceeding at the trial.

At such trial it was admitted that DAVID WEBB had been owner in fee of the land in controversy and executed the deed of trust to Jenners, and that Webb continue to own the land until the Marshal's sale, unless his title was divested by the trust deed. Fol. 12.

The lessor of plaintiff gave in evidence a judgment against David Webb and Abraham Shoemaker, in the United States Court for Indiana, entered Nov. 19th, 1858, execution thereon issued December 17th, 1858, and a return to such execution May 20th, 1859.

The return (Fol. 19) is as follows:

"The within annexed writ of execution in case of George Pomeroy, Lewis O. Wilson, Elias Butler and William Baldwin vs. David Webb and Abraham Shoemaker, came to hand on the 19th day of December, 1838. On the 27th day of December, 1838, by virtue of the within annexed writ of execution, the defendants herein having no personal property whereon to levy, I levied upon, seized and took in execution, as the property of the said defendants, David Webb and Abraham Shoemaker, all the following described tracts and parcels of lands and lots" (here follows the description). "And afterwards on the — day of ————, in the year 1839, at the State House

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door, in the town of Indianapolis, in the County of Marion, and State and district aforesaid, first having due and timely notice of the time and place of sale, as required by law; and having first, then and there, offered for sale the rents and profits for the term of seven years, of all the said lands, lots and premises, and having no bid therefor' I did then and there, by virtue of, and in pursuance of the said writ of execution, expose to sale, and then and there sell to George Pomeroy, Lewis O. Wilson, Elias Butler, and William Baldwin, all the above described tracts and parcels of land, lots and premises, in fee simple, for the sum of sixty dollars, they being the highest and best bidders, and that being the highest and best price bid, or offered for the same, said land, lots and premises having been sold separately, and said sum being the aggregate amount of said sales, which sum has been duly accounted for and settled by said purchasers.

GAMALIEL TAYLOR,
Marshal Indiana District

Per C. J. HAND, Deputy."

The plaintiff then offered in evidence the *Marshal's Deed* which was objected to by defendant, on the following grounds:

First—It disclosed on its face that the sale was made at Indianapolis, more than sixty miles from the property sold.

Second.—It bore no evidence on its face, nor was it proved at the trial, that the property sold was advertised in a newspaper printed and published in the said County of Tippecanoe, where the said land is located.

The Court overruled the objection, and allowed the deed to be read in evidence.

The amount of the bid was $60. The plaintiff then read in evidence, though objected to as irrelevant, what was

agreed by the parties to be a memoradnum showing all execution sales, had under execution issued from the United States Circuit Court, for the District of Indiana, from the organization of the Court to the time of the adoption of the rules at May Term of said Court for May 1847.—Fol. 21.

It was admitted that all sales or executions after the adoption of said rules, were made in the counties where the land were situated, Fol. 33. The plaintiff then gave in evidence the judgment and execution under which the property was sold, the Marshal's certificate, as to such sale (and under objection and exception,) a list of other judgments against Webb and Shoemaker in the Tippecanoe State Circuit Court, and proceedings connected therewith in Oct. 1837, amounting to $6,531 83. Fol. 33 to 37.

The plaintiff next read in evidence *without objection*, a list of judgments and proceedings connected therewith, rendered in the same Tippecanoe Circuit Court, against Webb and Shoemaker, amounting to $9,766 78; (Folio 78 to 80.

Also two mortgages on the land in question, (Folio 80 to 87) and proved that one of these mortgages was foreclosed, and regular sale made under the decree to secure $2,365.

The defendant then (Folio 88) offered in evidence the FIRST DEED. It was objected to as being void *on its face* being made with the intent to hinder delay and defraud creditors.

The court overruled the objection and plaintiff excepted (see deed from Fol 88 to 103). Defendant then read a list of judgments against Webb and Shoemaker being the same to the proof of which by plaintiff he objected and excepted at (Folio 77) as mentioned in these points, and proved that of the time the trust Deed was executed a writ of *Fieri facas* on each of said judgments in April Term, 183[illegible], was in the hands of the Sheriff, and that the whole proceeds of the $9.000 note mentioned in the deed of trust were used in paying off the judgments of October 1837 and cost thereon accrued, and also a debt to Samuel Havner from Webb and Shoemaker, secured to him by

said mortgages above named, under which Davis obtained his decree and other small encumbrances, and also proved the consent of all said judgments creditors (excepted these of October Term 1837, and the lessors of the plaintiff) to the trust deed, and also the consent thereto of the State Bank of Indiana, such consents having been given shortly after the execution of the deed and before the judgment under which the Marshal's sale to the lessors of the plaintiff was made. The defendant also proved Jenner's acceptance of the deed of trust (Fol. 105). Defendant then proved that during the Winter of 1838–1839, and the Spring of 1839 a public newspaper of general circulation was printed and published in the aforesaid town of Lafayette, called the *Free Press*, and during the same period and at the same place, another newspaper called the *Indiana Eagle*—that the sale in question was not advertised in the *Free Press* (Folio 101).

The defendant put a question to a witness with a view to prove that such sale was not advertised in the *Eagle*, but the question was overruled, (Folio 107).

But under a stipulation at Folio 109, the question was afterwards put and answered, plaintiff objecting and excepting.

We do not press this exception, because if the main question in the case be decided against us, a new trial on this ground would be of no advantage to plaintiff.

Defendant then proved that the real estate described in the trust deed, was at the time of the Marshal's sale worth $17,500. And so much of it as was described in the declaration in the ejectment suit was worth $5,000.

It was proved by defendant (without objection), that immediately after the execution of the deed of trust, he took possession as trustee of all real and personal property described in that deed with some trifling exceptions, and continued so in possession executing the trusts and applying the proceeds as directed by the deed, neither of the grantors ever after the deed was executed receiving any part of the property, or proceeds, or exercising any control over the same.

Also that the distillery referred to in the deed of trust

was located on the lands described in the declaration aforesaid. It was admitted (Folio 111) that the trustees had proceeded to execute the trusts in said trust deed according to its provisions.

The writ of Error to this Court was brought, December 18th, 1861, the citation served on the Bank, February 25th, 1862.

POINTS.

I.—As the Marshal's Deed.

First—The returns of the Marshal shows that he "*had given due and timely notice of the time and place of sale as required by law.*"

This is to be taken as true until the contrary appears, and in this case the contrary did not appear.

2.—But if the Marshal had committed any error as to the place of sale or mode of advertisement, this would have been immaterial the plaintiff in the execution or the purchaser not being instrumental in the irregularity.

In *Kilby* vs. *Haggin*, 3*d J. J. Marshal's* (*Ky.*) Reports 213 the Court say "nor could the sale be effected by any irregularity "or defect in the advertisement, unless Haggin (execution plaintiff and the purchaser) had been privy to it." And the same Court, in *Sander's heirs vs. Norton* 4 *Monroe* (*Ky.*) *Reports* 465 *say* "That purchasers generally are not "effected by the erroneous or irregular proceedings of the "officer making the sale, is long since well settled ; and we "conceive the same principle applies to plaintiffs in execu- "tions, as to every erroneous act of the Sheriff over which "they have no direct control, and which they have not been "instrumental in producing

Second—The sale is not void for having been *made* at Indianapolis.

This question, as also whether the trust deed under which the defendant claims, is fraudulent and void as to

the lessors of the plaintiff was passed upon by the Court below in this case and discussed by the Supreme Court of Indiana in *Jenners et al. vs. Doe ex dem &c.*, 9 *Indiana Reports* 461. The titles in both cases are identical, though the realty in each was different.

The State Court, or rather the Judge delivering the opinion says, the *trust deed is void;* but the Court decided the Marshal's sale *inoperative* because it was not made in the county where in the realty is situated. The Court below, in the case at bar, held the *Marshal's sale* was *regular and valid*, but that the trust deed was *operative and carried the title.*

There is contained in this record evidence bearing on the sale that was not before the State Court. This evidence consists: *First*, of the order of the Circuit Court, directing the execution of a deed, by the successor of the Marshal who made the sale; the petition and order of the Court are those contemplated by the Act of Congress of May 7th, 1809, when the Marshal goes out of his office without executing a deed.

It is an order in the original case, and as much a part of it, as the ordinary order confirming a deed, when that order is necessary.

This order, it is submitted, is an adjudication by the Court as to the regularity of the Marshal's sale, and the propriety of its being perfected by the execution of a deed; and cannot be questioned collaterally.—*Voorhees et al. vs. Jackson, ex. dem. Bank, of U. S.* 10 *Peter's Reports.* 449 (12 *Curtis* 193.) *Geignon et al. vs. Astor et el.*, 2 *Howard* 319, (15 *Curtis* 125) *Forsyth vs. Balance*, 6 *McLean* 567.

Second—This record shows that from the organization of the U. S. Circuit Court in Indiana, till May 1841, there were *thirty* sales of realty under executions issued on judgments rendered by the Court (not including the one under consideration); of these *four* were *in the Counties where the lands were located, four* were made *at places not named in the return*, and *twenty-two* were made *at Indianapolis*, the *lands not being in Marion County.* Among the

purchasers at these sales were the lawyers, who had the most extensive practice in that Court during the period named.

The *act of Congress* of May 19, 1828, directs that the final process in the Courts of the United States, except their style, &c., shall be the *same as are now used in the State* where the Court is held.

The *Indiana Statute* of 1824 (Revised Statutes of 1824, p. 189) prescribes no place at which execution sales of either real or personal property shall be made. It leaves the *place* of sale *to be selected by the Sheriff.*

No change was made in this particular until the Statute of the 13th *February*, 1841 (Act of 1841, p. 130, sec. 4), which enacted that execution sales of realty should be made at the door of the House of the County in which the lands lie. And this became the rule regulating Marshal sales, by the rules of the United States Circuit Court for the district of Indiana, at the May Term, 1841. Since which time such sales, after the execution of the deed under which we claim, and which, as we have seen, was Executed August 19th, 1840.

But in the case of Jenners et al. *vs.* Doe *ex. dem.* Pomeroy et al. *supra*, the Court say under the statute of 1824, though the place of sale was to be selected by the Sheriff, yet *his discretion was bounded by the limits of his County, and the Marshal's discretion must be exercised within the same limits.*

That the Sheriff must make such sales within his County, it is submitted, results not from any provision of the execution law of 1824, but from that in relation to Sheriff, by which his power is confined within the limits of his County.

The statute of the State defines the bailiwick of the Sheriff, beyond which his power does not extend, and within which any discretion, vested in him must be exercised.

So the act of Congress fixes the bailiwick of the Marshal within which his power and discretion is confined.

By the *Act of Congress* of the 24th September, 1789, and the act creating the district of Indiana, the Marshal's

bailiwick is *made co-extensive with the State*, and he is "to execute" throughout the district all lawful precepts to him directed, and issued under the authority of the United States.

If there had been a special act of Congress creating the district of Indiana, and which had provided that final process, and the manner of its execution should be as follows, and then copied the execution law of 1824, substituting only the word "Marshal" for words "Sheriff or other officer" throughout the act; in such an act of Congress there could not be found any regulation as to the place of making the execution sales, nor any limit to the discretion of the Marshal in selecting the place of sale.

That he must sell within his district would not result from such act, but from the one defining his bailiwick, and confining his powers to its limits.

Suppose the Marshal should have levied in Tippecanoe County upon cattle or other live stock, and found it necessary or convenient to remove them across the county line, to have them properly kept and cared for until the sale, would this amount to a conversion and make him a trespasser as such acts would, if done by the Sheriff of Tippecanoe County?

By the *Act of Congress* of the 3d of March, 1791, under certain circumstances the Marshal might prepare in his district a place to keep his prisoners. Had he prepared such a place at Indianapolis, arrested a debtor on a *ca. sa.* in Tippecanoe County, removed him to Indianapolis, and then imprisoned him, would he have been liable for a voluntary escape to the execution, plantiff, and for a false imprisonment to the defendant.

Not only does the record show this sale to have been in accordance with the practice of the Court; but the finding of the Court is expressly to that effect, and under this finding, the sale at Indianapolis is to be held regular and proper, if it would have been so held had there been an express rule of Court authorizing the Marshal to make all sales of realty at that place. *Curtis vs. Cin. R. W. Co.*, 6 *McLean* 403—*Duncan vs. United States* 7 *Peters* 613, (7 *Curtis* 725.) *Wayman vs. Southard*, 10 *Wheaton* 39 (6 *Curtis* 311.)

This is a question of practice in the Circuit Court, and the ruling of that Court would seem conclusive.

Third—It was suggested in the Court below, that the sale by the Marshal was for *sixty* dollars only; the property being worth $11,000, and this was urged as showing injurious consequences arising from the mode of sale. We do not see how any suggestion of the kind can be appropriately made on this argument, but in justice to our cause submit, especially as this value was proved at the trial that

1st—The record shows, as we have alreay seen, judgments against Webb and Shoemaker. in the County of Tippecanoe Circuit Court, unsatisfied at the time of the Marshal's sale amounting to $16,297 82.

Also, that there was a still older mortgage, on which a decree was subsequently rendered in favor of Davis for $2,365, and some other still older liens.

It will be observed that the judgments above are set down merely at the principal, including neither costs or interest, and no account is made of liens still older than the judgments, except the one in favor of Davis, which is still in force.

The purchaser at the Marshal's sale, by that purchase, could only acquire the legal title to these lands, subject to all liens that were prior in date to the 19th day of November, 1838, (the date of the judgment under which the sale was made.)

What was, at the time of the sale the value of these lands, after deducting the prior liens?

The liens were nearly double the value of the entire property, and a sale under even the latest of the prior judgments, while the lien continued, would absolutely have defeated the title acquired. The purchasers did not get a title of any value at the time, but a mere naked legal title, with the probability that it might acquire future value.

The money raised at the time of the execution of the trust deed, was applied towards the extinguishment of the judgments of October, 1837, after paying some prior liens. We suppose the parties raising the money to pay these

earlier liens, might, while the lien of the October judgments continued, have been substituted to the right of the plaintiffs therein, so far as they were paid. But it is unnecessary to inquire particularly as to such right, as the other judgments on which no payments were ever made, and which certainly, as against these purchases, constituted a lien, with the Davis mortgage, amounted so a sum larger than the value of the whole property.

These facts disclosed in the transcript of the record in this cause, show that a *full more than full price* was paid for the title acquired, thus encumbered, without at all taking into the account the shadow on the title created by the trust deed.

The fact that the mass of these liens were allowed to expire by a failure to enfore them for some nine years after the purchase, and thus gave value to the title, cannot affect the value of that title when it was acquired. And it follows, that as there was no proof of any inadequacy of price, that no question as to the effect of inadequacy, great or small, could arise. The purchasers got a mere *chance* of future benefit, paid its full value, and in morals as well as in law, have the right to any advantages accruing from it.—*Merriweather's Adm'r. vs. Herran*, 8 *B. Monroe, (Ky) Reports*, 162.

II. As to the trust deed.

The statutory provision in force at the date of the deed —*Revised Statutes of Indiana*, 1838 *p.* 225, *sec.* 9 *enacts*:
"That any person who shall be a party to * * * any assignment, grant, gift, deed or other conveyance of any estate or interest in land," &c., "made or executed with a view to defraud prior or subsequent purchasers, *or to hinder delay or* defraud creditors,"
"shall on conviction be imprisoned," &c.,
"and *all such sales, deeds, conveyances and assignments shall be absolutely null and void.*

The deed of trust in question, is a conveyance by Webb and wife and Shoemaker, dated 5th of November, 1838.

conveying to William M. Janners all the real estate embraced by the Marshal's deed, and assigning to him certain choses in action, &c., to be converted into money, and applied as provided for in the deed. There are in the deed certain provisions which we insist bring it literally within the statute quoted above, and render it *null and void.*

The deed is too long to quote entire, and a fair view of the question stated, may be had from an examination of parts of it.

It recites, that Webb & Shoemaker "are largely in-"depted to sundry persons. And, whereas it is believed, "that their property would fall far short of satisfying "those debts, if collections were sought to be enforced by "the summary and usual process of law"——————— "whereas an advantage would arise to the condition of "Webb & Shoemaker, by placing in the hands of a trustee "for disposition, as well as the property of said parties, "subject to execution, as choses in action not subject to "execution, thereby enlarging the fund subject at law to "the payment of those debts, *and avoiding the sacrifice of* "a *sheriff's sale, as well as a mutual advantage to said Webb* "*& Shoemaker*, from the prospect of realizing a greater "sum of money for their property, and discharging a "greater portion, and as they hope, all of their debts." Then follows the grant to Jenners and his successors, after which the trust and powers are thus described:

"And it is hereby declared and provided, that the grant, "bargain, sale, conveyance, transfer and assignment hereby "made is to be subject to the following trusts, and ac-"companied with the following powers, that is to say: the "said trustees and his successors may from time to time "by proper and apt instruments in writing or other con-"tracts, bargain, sell, convey, transfer, assign and dispose of "all and singular the property and things hereby conveyed "to him as such trustee, to any person or persons for money "or other valuable article, to be afterwards by him con-"verted into money, or securities for money upon such "time and terms as he shall think most conductive to the "interests hereby intended to be promoted, *provided, how-*"*ever, that he shall not make sale of any part of the real*

"*estate hereby conveyed within the period of eighteen months* "*from this date, unless a fair price can within their time be* " *obtained therefor, and at any time when he shall make sale* " *of any part of the real estate, he shall not in such contract* " *of sale give a larger credit than five years upon any part,* " *of the purchuse money, he shall have power to rent, lease and* " *hire the said real estate from time to time, but no lease hold* " *term to exceed three years;* he may allow the said parties " of the first part *to continue* in his name and for his use " as such trustees *in the distilling business* on that portion " of the premisses now used for that purpose, and allow " them to enjoy such possession of said premisses and per- " sonal property as may be necessary and convenient for " conducting snch business, *and the business of fattening hogs* " or the like, which usually is connected with distilling, " *allowing them such reasonable compensation for their* "*services as may be necessary for their comfortable sustenance,* " but having at all times the control and ownership as such " trustee of said business and the property employed " therein, with the right to take immediate possession at " any time when he shall think proper to do so."

If the deed comes within the statutory provision quoted, if it appears on its face to be " *made with a view to hinder, delay, or defraud creditors,* it is made in violation of a distinct and clear statutory prohibition, is in violation of law, and would be void, even without the express declaration of the statute that it " *shall be absolutely null and void.*" *The State, &c., vs. The State Bank et al.,* 5 *Indiana Reports* 353.

The rule as to such deed, laid down by Burrell is: "And " when on a trial before a jury, an assignment shows *on its* " *face,* that it was made in trust for the use of the assignor, " either in whole or part, the Court is bound to pronounce " the transaction void, without submitting the question to the jury." *Burrilt on Assts.* 172. *Goodrich vs. Downs,* 6 *Hill's (N. Y.) Reports,* 438.

There is no duty of a Court clearer than that of determining in every instance the meaning, the scope and effect of a written instrument. If it be *void* as contrary

to law, the Court must so pronounce it. There is no question of fact to be submitted to the jury. *Burrill* 173, *Ward vs. Trotter*. 3 *Monroe's* (*Ky.*) *Reports* 1. *Henderson's vs. Bliss, et al.*, 8 *Indiana Reports*, 100.

It may be contended that the 1st Revised Statutes, 1852, p. 303, sec. 21, requires the question of intent to be submitted to a jury.

A.—Whether the Legislature intended to introduce a new rule is scarcely necessary to inquire, as that enactment is expressly confined to cases arising under the act of which it is a part, though it would seem scarcely to effect the rule, that the Court must determine the legal character and effect of all written instruments. Under a precisely similar statute with that above cited, the Courts of New York have held where the deed itself furnished the evidence of the intent to delay or hinder creditors, the Court is bound to pronounce the deed void without submitting the question to the jury. *Goodrich vs. Downs* 6 *Hill*, 438. *Cunningham vs. Freeborn*, 3 *Page* 557, 564. *Mr. Justice Buller, in Eastwick vs. Cailland*, 5 *Term Reports* 440 *says:* "*Fraud is sometimes a question of* law, sometimes a question of fact, and "sometimes a mixed "question of law and fact. *If we are to decide on the face of the deed, itself, that is a question of fraud in point of law.*" Burrill p, 398 says: "Assignments are "constantly declared void *on their face* * * when "they contain any provision expressly intended to hinder, "delay or defraud a creditor."

B.—But the parties may waive a jury, and then all the question of law and fact, may and must be determined by the Court. Such a consent was given in this case, and of course no question in regard to a jury can be raised.

Second—The deed in question plainly appears to have been made with a view to hinder and delay creditors.

The recital shows the purpose to be "*avoiding the sacrifice of a Sheriff's sale, as well as a mutual advantage to said Webb & Shoemaker from the prospect of realizing greater sum of money, &c.*

The purpose here decided, is to avoid a sacrifice of the property, that is, a sale of it for less than its full value, to place it beyond the power of any creditors to force sales. The whole scope and effect of the deed is evident from the recital quoted, when connected with the following clause as to the power conferred on trustee, "*provided, "however, that he shall not make sale of any part of the real "estate hereby conveyed within the period of eighteen months "from this date, unless a fair price can within that time be "obtained thereof.*" It will be claimed that this latter clause merely imposes on the trustees a duty that would have existed without it.

This was not so understood by the parties executing the deed, nor is it in anywise true. The duty of the trustee after the expiration of the eighteen months would have been within a reasonable time to sell for the best price he could get, whether he could get a fair price or not. He then must sell, though at a sacrifice. This would have been his duty immediately upon the acceptance of the trust, had his provision been omitted, and the performance of this duty the creditors could at once have enforced through the medium of the Courts. But with this clause in the deed, the trustee could not sell nor could the creditors compel him to sell, unless it could be done without a sacrifice, till the time fixed had elapsed. The duty of the trustee and the acts he could be compelled to perform before and after the expiration of the eighteen months were essentially different. Before, he could only sell for a *fair* or full price; after, for the best price he could get, though it involved a sacrifice.

The necessary effect was not only to "*prevent the sacrifice of a sheriff sale,*" but absolutely to withdraw the property from the power of the creditors for eighteen months. By no means known to the law could they within that time compel its sale, and they must necessarily be "*delayed and hindered*" for that period.

2d—The case of *Ward et al. vs. Trotter*, 3 *Monroe*, 1, *supra*, is directly in point. There the object stated in the recital of the deed was to *prevent a sacrifice*, and an

attempt was made to withdraw the property from the power of the creditors for a year, the assignee not being permitted to sell within that time. The Court say, "There is certainly nothing dishonest in making a conveyance with intention to secure the payment of a man's debts nor in doing this, can it be deemed unlawful to prefer, as it was the intention of Kelley to do in this case, some of his creditors to others; for a man may lawfully pay some of his creditors before others, so he may lawfully secure the payment of some in preference to others.

"But besides the intention to secure the payment of his debts, and the intention of preferring some of his creditors to others, Kelley has avowed another and further in making the deed of trust to Ward; and that is to prevent his creditors from sacrificing his property at their discretion. How were his creditors to sacrifice his property? They could only do so by taking it and having it sold under execution in satisfaction of their debts, and this it was lawful for them to do. The deed must therefore have been made, according to the repeated avowals of Kelly on its face, with the intent or purpose to prevent or hinder the creditors from effectually using the lawful means of obtaining the payment of their debts. Such an intention is evidently dishonest and unlawful, and a conveyance made with that intent or purpose, is forbidden by the statute against frauds and perjuries, and declared to be void as to creditors and purchasers."

3— The deed immediately after the last question above, proceeds, "*and at any time when he (the trustee) shall make sale of any part of the real estate he shall not in contract of sale give a longer credit than five years, upon any part of the purchase.*

Take this, with the provision that he shall not sell for less than a fair price, and the purpose to delay creditors is unquestionable. There is a delay of eighteen months unless a fair price can be had, with a trustee of the debtor's own selection, the sole judge of what is a fair price giving him rather than themselves, the right to judge of what is a fair price, allowing neither the creditors, directly, nor through the legal tribunal, any control. Here is a delaying of creditors for eighteen months, followed

by a further delay of five years or more, for if the deed is valid the trustee could at any time after the expiration of the eighteen months sell on a credit of five years, and the creditors could not complain. Nor could a Court compel a sale for money on a shorter credit.

4th—Even take the rule of law to be, that a power to sell on *credit* may be given, and it does not help the deed. Such power will be to sell on *reasonable* credit. What that reasonable credit might be, would be a matter the courts could determine, and they would hardly think of holding the power complied with, by selling on a credit of *five years*. No such adjudications have yet been made.

5th—This deed contains a further provision of delay, the power "*to "rent, lease or hire the said real estate from time to time, but no lease hold term "to exceed three years.*"

There is provision after provision for delaying creditors. Amongst others that the trustee may permit the grantors to continue the distilling business "*allowing such compensation for their services as may be necessary for their comfortable sustenance.*"

This is not a clause for a reasonable compensation for services actually rendered. The compensation as it is called. is not in anywise dependent on the services rendered or to be rendered, but though the services are of little or no value, the compensation is to be so much *as may be necessary for their comfortable sustenance.*

It is a provision for the "*comfortable sustenance*" of the grantors with their families out of the trust property, sought to be legalized by calling it *compensation*, evidently with the view to defraud creditors, by thus withdrawing a part of the trust property from the power of the creditors, and appropriating it to the benefit of the debtors.

Whether the anticipated benefit was realized by the debtors is a matter of no consequence. As to this objection to the deed, several of the authorities cited above as directly in point. Burrill 168, says: "Here it is a general "rule in American law, that a clause or provision in an as"signment by which any benefit or advantage is reserved

" to the debtor at the expense of the creditors, whether " such benefit be temporary or permanent, whether it be " in the shape of payment of a gross, or annual sum, em- "*ployment at a compensation* or otherwise, and whether " reserved to the debtor himself or for the support of his " family, is a fraud in law, and vitiates and avoids the " whole assignment."

See opinion of Court below on this point.

III.—There is no warrant for the position of the Defendants in error, that the trust deed can stand and be worked out as a mortgage or security, in contradiction of its terms and legal effect. This would be to convert it into a totally different instrument from what it is, and to give effect to a deed which is void on its face.

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